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# AMERICAN STATE TRIALS

*A Collection of the Important and Interesting Criminal Trials which have taken place in the United States, from the beginning of our Government to the Present Day.*

**WITH NOTES AND ANNOTATIONS**

**JOHN D. LAWSON, LL.D.**

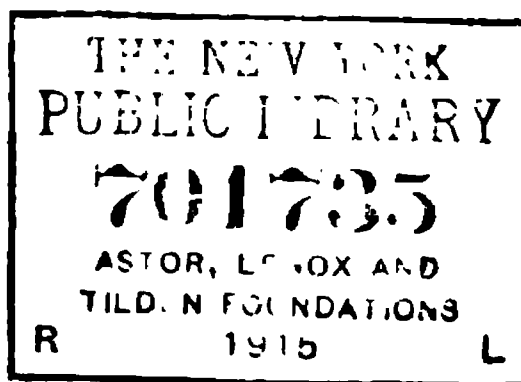
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**1915**



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JOHN D. LAWSON  
1915



TO  
WILLIAM HALL WALKER  
OF BROOKSIDE, GREAT BARRINGTON,  
MASSACHUSETTS,

AS A SLIGHT BUT SINCERE TOKEN OF  
GRATTITUDE FOR HIS FRIENDSHIP AND  
ADMIRATION FOR HIS GENIUS, THIS  
VOLUME IS AFFECTIONATELY DEDICATED.

WEDNESDAY  
JULY 19  
1950

## PREFACE TO VOLUME THREE.

The trial of *Susan B. Anthony* (p. 1) has a large interest today, for it marks the very beginning of the militant struggle for female suffrage. Miss Anthony was the earliest leader of the movement in this country. After a good many years of argument and persuasion, which seemed fruitless so far as male converts were concerned, the Fourteenth Amendment to the Constitution was adopted, which declared that all persons born or naturalized in the United States were citizens of the United States, and prohibited the States from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States. She planted herself squarely upon this, as upon a rock; declared that the battle was won and that woman had at last a constitutional right to vote. "We no longer," she said to her followers, "petition legislatures or Congress to give us the right to vote. We have it. I ask women everywhere to exercise their too long neglected right. I ask the inspectors of election everywhere to receive the votes of all United States citizens, as it is their duty to do; the United States marshals to arrest inspectors who reject the names and votes of United States citizens. And if you are prosecuted by officers who will not obey the law of the land, I ask juries to fail to return verdicts of guilty against honest, law-abiding, tax-paying United States citizens for voting or offering their votes at elections." She found good lawyers who gave their opinions in her favor and, armed with one of these, Miss Anthony and a dozen or more of her followers in Rochester, N.

Y., persuaded the registers of election to record their names and the judges of election to receive them, at an election for Congress and the State and federal offices in November, 1872. Indicted by the grand jury and tried for illegal voting, the Judge ruled that the case was so plain against her that there was nothing for the jury to decide, and directed them to return a verdict of guilty, which they did. She refused to pay the fine, but when she was threatened with imprisonment, her counsel paid it for her. When she learned this, she protested that she would rather be imprisoned than satisfy the unjust penalty, but the courtly lawyer replied: "Madam, I could not see a lady I respected put in jail."

The trial of Inspectors *Jones, Marsh and Hall* (p. 54) followed, and they were all three convicted with the same promptness as was Miss Anthony. Hall vainly protested that on the question of allowing the women to register and vote he voted no, the Judge holding that it was the act of the board and not of individuals and that all were equally guilty. The astonished man exclaimed that he had done everything he could short of killing his two colleagues. No, Mr. Hall, you did not, there was a means you did not employ, but one which rarely occurs to the holder of a petty political office—you might have resigned.

The trial of *Matthews Ward* (p. 70) for the killing of a schoolmaster is another of the great Kentucky cases which (like the trial of *Wilkinson*, 1 Am. St. Tr. 132) illustrates Kentucky forensic oratory fifty years ago. The evidence, read calmly after all the parties to the tragedy and the passion it aroused have passed away, leads to the conclusion that it was a premeditated murder without one redeeming feature. A pupil

at a Louisville public school is punished by the principal for lying and goes home and tells his family. An elder brother the next morning, after visiting a gunsmith and purchasing a couple of loaded pistols, goes with another brother, also armed with a bowie knife, and the "bad boy" to the school. They stalk into the school-house, and in the presence of the scholars, Matthews demands an apology. The schoolmaster asks him to step into his private room, where he will explain. Matthews refuses, calls him a scoundrel and a coward, and when the master puts his hand on him to eject him, Matthews shoots him. He is carried to a neighboring house, where he dies that night. The tragedy shocks the city; the master is one of its most respected citizens, and the public calls for swift punishment. But under that peculiar doctrine of American criminal law that the perpetrator of a great crime is not to be hurt by the public sentiment which he himself has created, the case is removed for trial to the country and most of the leading lawyers of the state are employed to defend him. The murderer's family are rich and influential and nothing is spared to accomplish his acquittal. Friends of the family in high station are summoned to his aid. A member of the cabinet, members of Congress, judges and others testify to his good character and peaceful disposition. And to make assurance doubly sure, a carpenter named Barlow appears as a witness and swears that he followed the party into the house where the deceased died and heard the schoolmaster tell the surgeon that he struck Ward before he was shot. This story is made much of by the counsel for the defense, even though nobody is found who saw the carpenter in the house, and the surgeon denies that the schoolmaster

made such a statement to him. The jury returns a verdict of not guilty, and when the news reaches Louisville a great public meeting is held at the court house and resolutions denouncing the jury and the verdict are passed; the murderer and the carpenter are burned in effigy and the Ward residence is sacked and burned.

The case much resembles that of *Wilkinson*, though none of the speeches equal that of Seargent S. Prentiss or Benjamin Hardin in that *cause celebre*. Three of the great orators of Kentucky, John J. Crittenden, successively Governor, Senator and Attorney General of the United States, Governor John J. Helm and the silver-tongued Tom Marshall, made eloquent speeches to the jury. But the counsel for the Commonwealth had easily the best of the argument both on the law and on the facts. Mr. Carpenter's denunciation of Barlow, the carpenter, is a good example of the style of oratory prevalent in judicial battles at this period of our history (p. 120).

"The defense then introduced the man Barlow. It is always unpleasant to attack any one when it is known he cannot defend himself, but he voluntarily placed himself in this most unenviable position; and justice to the memory of the deceased, and the history of this case require that he should be held up to this jury and the world, as an object of withering scorn. It is not necessary to charge Robert J. Ward with bribing this villain to account for his perjury, although it is highly probable that he expected to be paid for his infamy. There are men in society, or rather in the sewers of society, who reptile-like move and live in its excrescences and slime, who think they have achieved the very highest enjoyment, known to their low groveling hearts, if they can obtain a single smile from the rich and powerful, and who only breathe freely when they inhale the air of toadyism. This witness belongs to that class; he is content to be a tool and a villain to prejudice his soul, and sell heaven itself, for the sake of saying he has been at the house of Robert J. Ward,—a millionaire—been invited into the parlor and kindly treated. He is decidedly of a lower grade of animal than the

ordinary villain who receives so much money for a given amount of false swearing. It is proved he offered to bet on the result of this trial, and perhaps did, and that he had said Ward promised to remunerate him amply for coming down to this trial. Did you not observe, gentlemen, his conscience-stricken manner when we asked if he had not said so, the flush face—the striking of both hands upon his head? ‘Guilt makes cowards of us all.’ He was a day laborer in a coarse garb, but the change in his opinion about the prisoner’s guilt produced a corresponding change in his costume, and he is now as you see a second Count D’Orsay, wearing upon his person the price of his crime. His whole statement, from beginning to end, is a sheer fabrication.”

The miscarriage of justice was not soon forgotten in the city where the crime was committed, and Governor Crittenden felt called upon to publish a vindication of his connection with the case. In this he stated that he had volunteered his services because he was an old friend of the family; that he had refused to take any fee, and that in his long professional life he had never in a single instance appeared as counsel against any one on trial for a crime. “I have feared to do so,” he said, “lest in the spirit of controversy and pride for professional victory, I might be instrumental in bringing down unjust judgment on the head of some unfortunate fellow creature.”

*Archibald McArdle* (p. 303), in attempting to be both accuser and judge, found to his cost that the law considers these two positions quite incompatible.

A brutal murder was that of the little Irish girl by the barber, *Hanlon* (p. 306). Yet the evidence being entirely circumstantial, it is doubtful if he could have been convicted had not the prosecution resorted to the “spy” system, and sent the convict Dunn to be his cell mate, and under the guise of friendship worm from him an admission. One wonders if the French inquisitorial method would not have been even more effective; it certainly would have been more honest.



The trials of *Boott* and *Hooper* (pp. 370, 377) for delivering and sending a challenge to a duel, show the hopelessness of making a criminal of a man in the face of public opinion. Dueling certainly was not either common or popular in Massachusetts or Rhode Island in 1834, or at any other time; and yet in this particular case it was evidently thought by their neighbors that this was as good way of settling their difficulty as any other, and hence when the case got into the court nobody could be found who knew anything about it and the prosecution failed for lack of evidence.

The Anti-Masonic movement, which was the outcome of the Morgan disappearance (*Seymour and others* (p. 385), introduced to National politics three of those great political leaders of the Civil war time, William H. Seward,<sup>1</sup> Thaddeus Stevens<sup>2</sup> and Thurlow Weed.<sup>3</sup> The story of the subsequent fate of William

<sup>1</sup> SEWARD. WILLIAM HENRY (1801-1872). Born in Florida, New York. Graduated at Union College. Admitted to Bar 1823, and practiced at Auburn, N. Y. Elected as Anti-Masonic candidate to State Legislature 1830. Governor of New York 1838-1842. United States Senator 1849-1861. Secretary of State 1861-1869. Author of *Life of John Quincy Adams* (1849) and other works.

<sup>2</sup> STEVENS, THADDEUS (1792-1868). Born Danville, Virginia. Graduated Dartmouth 1814. Studied law and began practice at Gettysburg, Pa. Delegate to the Baltimore Anti-Masonic Convention 1831. Member of the Pennsylvania Legislature 1833. Member of Congress 1848-1852, 1858-1868 and the leader of the Republican Party in the House. Also leader of the prosecution of President Andrew Johnson on his impeachment.

<sup>3</sup> WEED, THURLOW (1797-1882). Born Cairo, N. Y. Journeyman printer in his youth. Served in the War of 1812. Editor *Rochester Telegraph* (1822) and *Anti-Masonic Enquirer*. Twice elected to New York Legislature on Anti-Masonic ticket. Founded *Albany Evening Journal* 1830 and became editor. State Manager of the Whig party and a powerful political leader from 1835 to 1865. Editor *New York Commercial Advertiser*, 1867. Author of "Letters from Europe and West Indies," 1866.

Morgan is best told by Thurlow Weed in his memoirs published after his death.<sup>4</sup> Weed was an editor of a Rochester newspaper at the time of the Morgan mystery—"a cloud which when it first appeared seemed no bigger than a man's hand, yet which spread out until it darkened the social and political horizon, occasioning a storm which not only violently disturbed the elements in the state, but divided and destroyed parties, churches, families and friends in New England, Pennsylvania, Ohio and Michigan." He espoused the cause of the Anti-Masons, edited a newspaper in their support, was elected to the Legislature on the Anti-Masonic ticket, and was one of the prosecutors of the men charged with the abduction of Morgan. Years afterwards, when the incident had been almost forgotten, and most of the actors were dead, he became quite intimate with some of those who had taken part in the abduction and one of these confessed to him the whole story, which Weed put in his memoirs, with an injunction that it should not be published until after his death. The man's name was John Whitney and his confession, beginning with the confinement of Morgan in Ft. Niagara, makes the mystery clear and settles all doubt as to the fate of William Morgan.

"Colonel William King asked me to step into another room where I found Mr. Howard of Buffalo, Mr. Chubbuck of Lewiston and Mr. Garside of Youngstown. Colonel King said there was a carriage at the door ready to take us to the fort, into which we stepped and were drawn hastily away. As we proceeded, Colonel King said that he had received instructions from the highest authority to deal with Morgan according to his deserts, and that having confidence in their courage and fidelity he had chosen them as his assistants. On reaching the magazine they informed Morgan that arrangements had

<sup>4</sup> Autobiography of Thurlow Weed, edited by his daughter, Harriet A. Weed, Boston. Houghton Mifflin Co. 1883.

been completed for his removal to the interior of Canada where he would be settled on a farm and that his family would follow him. With this assurance he walked with them from the fort to the ferry, where a row-boat awaited them. The boat was then rowed in a diagonal direction to the place where the Niagara River is lost in Lake Ontario. Here either shore being two miles distant, a rope was wound several times around Morgan's body, at either end of which a large weight was attached. Up to that time Morgan had conversed with them about his new home and the probability of being joined by his family, but when he saw the rope and the use to be made of it, he struggled desperately and held firmly with one hand to the gunwale of the boat. Garside detached it, but as he did so Morgan caught Garside's thumb in his mouth and bit off the first joint. The boat was rowed back to the ferry-house where the party landed observed only by the old soldier Adams who had made the boat ready for them and who accompanied them to the carriage which stood in the road a few rods from the ferry. They reached the hotel at Lewiston about two o'clock in the morning."

The most sordid and treacherous murder in this series is that of Francis Adolphus Muir by *William Dandridge Epes* (p. 412). Both were gentlemen planters of old Virginia. Epes not only kills his friend and guest, who as a lenient creditor has called on him to pay a long delayed debt, but he buries the body, forges a receipt of the bond and then tries to make it appear that Muir had collected the money and absconded in order to rob the co-heirs. (p. 417.) No one saw the murder; but never perhaps in the history of judicial investigation did a greater number of facts and circumstances concur in pointing out the murderer. (p. 504.) The trial is an excellent illustration of the principle that circumstantial evidence is stronger than direct; for men may lie, but facts cannot.

The trial of *Tucker* (p. 520) shows the Judge establishing a precedent regarding the place of the prisoner during the trial. The common law, to insure the safety of the prisoner, required that he should be

put in a box or dock; and the Judge ruled that in the future prisoners who were on bail should be allowed to sit with their counsel. The common law rule is still enforced in England, and on the Continent the prisoner is confined in a dock surrounded by guards, and sometimes in a cage. The distinction made by the New York Judge in 1820 has been long since abolished in the United States; for in this country at the present day in all classes of cases, the prisoner sits with his lawyers at the counsel's table.

Writing of the trial of *Lawrence* (p. 524), an American historian says: "Jackson immediately gave the attack a political significance. Some days after it Harriet Martineau called upon him and referred to the insane attempt. 'He protested in the presence of many strangers that there was no insanity in the case. I was silent of course. He protested that there was a plot and that the man was a tool.'"<sup>5</sup>

The trial of *Dean* (p. 542) reminds us that laws that unduly interfere with trade may lead even to murder.

*Bell* (p. 558) was probably a victim of political hate, but we shall meet more than one serious prosecution for blasphemy in future volumes of this series.

The trial of *Cherry* and his two companions (p. 562) is one of the earliest cases in the southern States which exhibit one of the results of the hasty gift of freedom and citizenship to an ignorant and servile race. Outrages like this became common all through the former slave states. Later the lawyers whom the negroes retained to defend them found a sure friend in the State appellate courts who, choked with their own technicalities, reversed conviction after conviction, until in sheer self-defense the people were obliged

<sup>5</sup> Sumner, Andrew Jackson, 361.

to substitute in the place of their constitutional courts the sure and swift decrees of Judge Lynch.

The trial of *Judd* (p. 603) for buying "fish oil" which had not been inspected according to law is unique. The defendant pleads that he bought whale oil and that whale oil is not fish oil because a whale is not a fish and relies upon the opinion of Dr. Mitchill, the great chemist and naturalist of his day. Certainly no man ever had a stronger champion. For years Dr. Mitchill occupied a position in New York City similar to that held by Dr. Oliver Wendell Holmes in Boston many years later. But the New York scientist was a public man and a politician as well and, in this capacity, Thomas Jefferson described him as the Congressional Encyclopedia and Directory. His prototype in England was Lord Brougham, of whom Samuel Rogers, seeing him driven away from a country house, said: "There go, Solon, Lycurgus, Demosthenes, Sir Isaac Newton and a great many others in a post-chaise." It is interesting to note that no other person dared to enter the lists as an expert for the state; and that the learned doctor's reference to the bar was hardly complimentary. "I say positively that a whale is no more a fish than is a man; nobody pretends to the contrary but lawyers and politicians." The speech of old lawyer Sampson, whom we have met before (2 Am. St. Tr. 542), is most curious with its quotations from the Bible and the ancient historians and philosophers. And the defendant's counsel quoted Oliver Goldsmith—not his poems but his *Animated Nature*. The sequel to the case shows that the methods of the New York legislature have descended to its successors in all the states. It promptly repealed the law under which Mr. Judd was convicted and confessed

that in enacting that law it had said what it did not intend to say.

Besides the fact that it was the first prosecution for the crime of embracery in the United States, the trial of *Clough* (p. 664) is notable, as presenting a most complete discussion of the question as to the competency of a mason to sit on a jury when the interests of a brother mason are at stake. The trial of the question of competency by "triors" instead of by the Judge is more fully set out here than in the previous cases in New York. (See 2 Am. St. Tr. 518, 840.) The difference in orthography should be noted—triers in New York, "triors" in Boston.

Have more members of the medical profession been called upon to be tried for their lives on indictments for murder than lawyers or other learned professions? is a question which the case of *Dr. Coolidge* (p. 732) and *Dr. Hughes* (2 Am. St. Tr. 714) may suggest.

A laughable church brawl was that of *Brown, Werten-dyke and Pike* (p. 803), and while the jury settled it with the wisdom of Solomon, the charge of Recorder Riker on the liberty of the subject, is worth preserving.

It would be interesting to compare the treatment of the prisoners in the hands of the different belligerents in the great war now raging in Europe with that of the English soldiers in the Revolutionary War and for which *Colonel Henley* (p. 806) was permitted to be called to account at the instance of the English commander, General Burgoyne. Military amenities have certainly not increased in the past century, for it would hardly be admitted in Europe today that prisoners of war were entitled to demand that a court should sit on the conduct of their captors. It is clear, as his biographer points out, that great latitude was allowed

to General Burgoyne in permitting him to have a court martial try Colonel Henley and to appear himself in the prosecution. He had no right to expect any favor from the Americans. His proclamation, at the beginning of the campaign, was still fresh in their recollections; and it could not be forgotten that he was responsible for some of the greatest atrocities that occurred during the war. It is quite apparent that his principal object in this trial was to obtain popularity with his army, and assistance in the unfortunate predicament in which the capture of that army had placed him at home. He accordingly exerted all his talents on this occasion, and conducted the prosecution with extraordinary ability. But in one other respect American national conduct was not so happy. The troops were never sent home, as had been promised by the treaty signed at Saratoga.

“But ere long the belief gained ground that they would be used in Europe to take the place of other troops who would be sent to America. Congress, therefore, found one excuse after another for not carrying out the convention. First, it demanded pay for the soldiers’ subsistence since the surrender, not in Continental money, but in British gold. Congress thus made a spectacle to the world by refusing to accept its own money. It next imposed an impossible condition by demanding that Burgoyne make out a descriptive list of all the officers and men of the army. So in various ways Congress evaded carrying out the agreement. The British soldiers were in fact never sent home. After being kept a year in New England they were sent to Charlottesville in Virginia, making the overland march of seven hundred miles in midwinter. Here a village of cottages was built for them. When, in 1780, Virginia became the seat of war, they were scattered, some being sent to Maryland, and others to Pennsylvania. Meantime their number had constantly diminished by desertion, death, and exchange. At the close of the war most of the Germans remained in America.”<sup>6</sup>

There will be many trials connected with the slavery question in the coming volumes, but that of *Walker*

<sup>6</sup> 2 Elson Hist. United States, 97.



(p. 803) is important for the penalty which followed. Certainly the stocks and branding on the hand would be held at this day a "cruel and unusual punishment" within the Constitution. But the victim was probably content to be regarded as a martyr to his cause, and to be the hero of a poem by Whittier was doubtless a complete *solatium* for all his sufferings:

"Welcome home again brave seamen! with thy thoughtful brow and  
gray,

And the old heroic spirit of our earlier better day  
With that front of calm endurance on whose steady nerve, in vain  
Pressed the iron of the prison, smote the fiery shafts of pain!

Is the tyrant's brand upon thee? Did the brutal cravens aim  
To make God's truth thy falsehood, His holiest work thy shame?  
When all blood quenched from the torture the iron was withdrawn  
How laughed their evil angel, the baffled fools to scorn!

*They* change to wrong the duty which God has written out  
On the great heart of humanity too legible for doubt.  
*They*, the loathsome moral lepers, blotched from foot sole up to  
crown

Give to shame what God hath given to honor and renown!

Why that brand is highest honor! than its traces never yet  
Upon old armored hatchments was a prouder blazon set  
And thy unborn generations, as they crowd our rocky strand  
Shall tell the story of thy father's branded hand.

Hold it up before our sunshine up against our Northern air  
Ho! men of Massachusetts for the love of God look there  
Take it henceforth for your standard like the Bruce's heart of yore  
In the dark strife closing around ye, let that hand be seen before!

And the tyrants of the slave land shall tremble at that sign  
When it points its finger southward along the Puritan line  
Woe to the state-gorged leeches and the church's locust band  
When they look from slavery's rampart on the coming of that hand!

We sometimes speak of the violence of our party politics and of the extravagance of party writers of our press of today. But think of this kind of language

from a gentle Quaker poet at almost the beginning of a political and sectional struggle which was to last for nearly twenty years!

The prompt prosecution of the padrone *Ancarola* (p. 868) put an end in this country to this infamous traffic and to the cruelties and outrages to which Italian children had been subjected through the ignorance and avarice of their parents.

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# THE TRIAL OF SUSAN B. ANTHONY FOR VOTING AT A CONGRESSIONAL ELEC- TION, NEW YORK, 1873.

## THE NARRATIVE.

At the election of President and Vice President of the United States and members of Congress, in November, 1872, Susan B. Anthony and several other women, offered their votes to the inspectors of election at the city of Rochester, N. Y., claiming the right to vote, as among the privileges and immunities secured to them as citizens by the fourteenth amendment to the Constitution of the United States. Two of the three Inspectors of Election decided in favor of receiving the offered votes, and they were received and deposited in the ballot box. For this act, the women, fourteen in number, were arrested and held to bail and indictments were found against them severally, under the Act of Congress of 1870, charging them with the offense of "knowingly voting without having a lawful right to vote." Of the women voters, the case of Miss Anthony alone was brought to trial, a *nolle prosequi* having been entered upon the other indictments. Upon her trial it was proved that before offering her vote she was advised by her counsel that she had a right to vote; and that she entertained no doubt, at the time of voting, that she was entitled to vote. It was claimed in her behalf: I. That she was legally entitled to vote. II. That if she was not so entitled, but voted in good faith in the belief that it was her right, she was guilty of no crime. III. That she did vote in such good faith, and with such belief.

But the Court held that the defendant had no right to vote—that good faith constituted no defense—that there was nothing in the case for the jury to decide, and directed them to find a verdict of guilty; refusing to submit, at the request

of the defendant's counsel, any question to the jury, or to allow the clerk to ask the jurors, severally, whether they assented to the verdict which the Court had directed to be entered. The verdict of guilty was entered by the clerk, as directed by the Court, without any express assent or dissent on the part of the jury. And a fine of one hundred dollars and costs, was imposed upon Miss Anthony.

#### THE TRIAL.<sup>1</sup>

*In the United States Circuit Court, Northern District of New York, Canandaigua, New York, June, 1873.*

HON. WARD HUNT,<sup>2</sup> Judge.

*June 17.*

In the previous month of January the Grand Jury for the Northern District of New York (United States Circuit Court), had returned an indictment against Susan B. Anthony<sup>2a</sup> for

<sup>1</sup> \* "Account of the proceedings on the trial of Susan B. Anthony, on the charge of Illegal Voting, at the Presidential Election in November, 1872, and on the trial of Beverly W. Jones, Edwin T. Marsh, and William B. Hall, the Inspectors of Election by whom her Vote was Received. Rochester, N. Y. Daily Democrat and Chronicle Book Print, 3 West Main street." An appendix contains two addresses (of 25 pp. each) by Miss Anthony and Matilda Joselyn Gage delivered at about fifty public meetings held before the trial and a criticism by John Hooker of Hartford, Conn., of the conduct of the trial.

<sup>2</sup> HUNT, Samuel Ward. (1810-1886.) Born Utica, N. Y. Graduated Union College 1828. Studied law at Litchfield, Conn. Practiced law at Utica, N. Y. Member of New York Legislature 1839. Mayor of Utica, N. Y., 1844. Judge of New York Court of Appeals 1855. Associate Justice Supreme Court of the United States 1872-1882. LL. D. Union and Rutledge Colleges.

<sup>2a</sup> ANTHONY, Susan Brownell. (1820-1906.) Born South Adams, Mass., the daughter of a Quaker cotton manufacturer. Her father removed to Rochester, N. Y., in 1846, and she taught school there from 1835 to 1850. In 1852 she began the agitation for female suffrage, and in 1857 became a leader. She was influential in procuring legislation giving rights to married women, and in 1865 founded the *Revolutionist*, a journal devoted to the emancipation of women. She was a delegate to the International Council of Women in 1899. In 1900 her birthday was celebrated at Washington, and she retired

voting illegally at an election held for members of the Congress of the United States in the city of Rochester, on November 5, 1872.<sup>3</sup> The defendant had pleaded *not guilty* and a jury having been impaneled the trial was begun today.

from the Presidency of the National American Woman's Suffrage Association, which she had held for many years. See History of Woman's Suffrage, edited by Elizabeth Cady Stanton, Susan B. Anthony and Matilda Joslyn Gage, 3 vols. Rochester, N. Y., 1887.

<sup>3</sup> The Jurors of the said District, then and there sworn and charged to inquire for the said United States of America, and for the body of said District, do, upon their oaths, present, that Susan B. Anthony now or late of Rochester, in the county of Monroe, with force and arms, etc., to-wit: at and in the first election district of the eighth ward of the city of Rochester, in the county of Monroe, in said Northern District of New York, and within the jurisdiction of this Court, heretofore, to-wit: on the fifth day of November, in the year of our Lord one thousand eight hundred and seventy-two, at an election duly held at and in the first election district of the said eighth ward of the city of Rochester, in said county, and in said Northern District of New York, which said election was for Representatives in the Congress of the United States, to-wit: a Representative in the Congress of the United States for the State of New York at large, and a Representative in the Congress of the United States for the twenty-ninth Congressional District of the State of New York, said first election district of said eighth ward of said city of Rochester, being then and there a part of said twenty-ninth Congressional District of the State of New York, did knowingly, wrongfully and unlawfully vote for a Representative in the Congress of the United States for the State of New York at large, and for a Representative in the Congress of the United States for said twenty-ninth Congressional District, without having a lawful right to vote in said election district (the said Susan B. Anthony being then and there a person of the female sex,) as she, the said Susan B. Anthony then and there well knew, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace of the United States of America and their dignity.

And the jurors aforesaid upon their oaths aforesaid do further present that said Susan B. Anthony, now or late of Rochester, in the county of Monroe, with force and arms, etc., to-wit: at and in the first election district of the eighth ward of the city of Rochester, in the county of Monroe, in said Northern District of New York, and within the jurisdiction of this Court, heretofore, to-wit: on the fifth day of November, in the year of our Lord one thousand eight hundred and seventy-two, at an election duly held at and in the first election district of the said eighth ward, of said city of Rochester, in said county, and in said Northern District of New York,



*Richard Crowley*,<sup>4</sup> United States District Attorney, for the Government.

*Henry R. Selden*,<sup>5</sup> and *John Van Voorhis*,<sup>6</sup> for the Defendant.

*Mr. Crowley.* Gentlemen of the Jury: On the fifth of November, 1872, there was held in this State, as well as in other states of the Union, a general election for different officers, and among those, for candidates to represent several districts of this state in the Congress of the United States. The defendant, Miss Susan B. Anthony, at that time resided in the city of Rochester, in the county of Monroe, Northern District of New York, and upon the fifth day of November, 1872, she voted for a representative in the Congress of the United States to represent the 29th Congressional District of

which said election was for Representatives in the Congress of the United States, to-wit: a Representative in the Congress of the United States for the State of New York at large, and a Representative in the Congress of the United States for the twenty-ninth Congressional District of the State of New York, said first election district of said eighth ward, of said city of Rochester, being then and there a part of said twenty-ninth Congressional District of the State of New York, did knowingly, wrongfully and unlawfully vote for a candidate for Representative in the Congress of the United States for the State of New York at large, and for a candidate for Representative in the Congress of the United States for said twenty-ninth Congressional District, without having a lawful right to vote in said first election district (the said Susan B. Anthony being then and there a person of the female sex,) as she, the said Susan B. Anthony then and there well knew, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace of the United States of America and their dignity.

<sup>4</sup> CROWLEY, Richard. Born 1836 Lockport, N. Y. Admitted to Bar 1860. City Attorney Lockport 1865. Member New York Senate 1865-1870. United States District Attorney 1871-1879. Member United States Congress 1880.

<sup>5</sup> SELDEN, Henry Rogers. (1805-1885.) Born Lynn, Conn. Admitted to Bar of New York 1825. Judge Common Pleas (Rochester). Judge Supreme Court 1847. Reporter New York Court of Appeals 1851-1854. Judge Court of Appeals of New York 1856-1864.

<sup>6</sup> VAN VOORHIS, John. Born Decatur, N. Y. 1828. Practiced law first at Elmira and then at Rochester. City Attorney Rochester 1859. Collector of Inland Revenue 1862. Member of Congress 1878-1884.

this state, and also for a representative at large for the state of New York, to represent the state in the Congress of the United States. At that time she was a woman. I suppose there will be no question about that. The question in this case, if there be a question of fact about it at all, will, in my judgment, be rather a question of law than one of fact. I suppose that there will be no question of fact, substantially, in the case when all of the evidence is out, and it will be for you to decide under the charge of his Honor, the judge, whether or not the defendant committed the offense of voting for a representative in Congress upon that occasion. We think, on the part of the Government, that there is no question about it either one way or the other, neither a question of fact, nor a question of law, and that whatever Miss Anthony's intentions may have been—whether they were good or otherwise—she did not have a right to vote upon that question, and if she did vote without having a lawful right to vote then there is no question but what she is guilty of violating a law of the United States in that behalf enacted by the Congress of the United States.

We don't claim in this case, gentlemen, that Miss Anthony is of that class of people who go about "repeating." We don't claim that she went from place to place for the purpose of offering her vote. But we do claim that upon the fifth of November, 1872, she voted, and whether she believed that she had a right to vote or not, it being a question of law, that she is within the Statute.

Congress in 1870 passed the statute under which this case is brought.<sup>7</sup>

It is not necessary for me, gentlemen, at this stage of the case, to state all the facts which will be proven on the part of the Government. I shall leave that to be shown by the evidence and by the witnesses, and if any question of law shall arise his Honor will undoubtedly give you instructions as he shall deem proper.

<sup>7</sup> See *post*, p. 9, opening of *Mr. Selden's* argument.

## THE WITNESSES FOR THE UNITED STATES.

*Beverly W. Jones.* Resided in Rochester, and was an inspector of elections on November 5, 1872, of the First District. The other inspectors were Edward T. Marsh and William B. Hall. Saw Miss Anthony vote the State, Assembly, Congressional and Presidential Election tickets. I received the ballots from her and put them in the separate boxes provided. Nobody challenged her vote at that time.

To *Mr. Selden.* The voters had been previously registered by myself and the other members of the Board of Registry. Miss Anthony appeared before us, and asked to be registered, but it was objected that as she was

not a male citizen she could not register, but we decided in her favor, and registered her name. One of the United States Supervisors of Elections agreed with us, the other did not.

To *Mr. Crowley.* When Miss Anthony was challenged before the Board of Registry, she took the oath that she was a legal voter. She said she did not claim her right under the laws of New York, but under the fourteenth Amendment to the United States Constitution. The poll list which I have in my hand shows that she voted the Electoral, State, Congressional and Assembly Tickets.

*Mr. Selden.* Gentlemen of the Jury: This is a case of no ordinary magnitude, although many might regard it as one of little importance. The question whether my client here has done anything to justify her being consigned to a felon's prison or not, is one that interests her very essentially, and that interests the people also essentially. I claim and shall endeavor to establish before you that when she offered to have her name registered as a voter, and when she offered her vote for Member of Congress, she was as much entitled to vote as any man that voted at that election, according to the Constitution and laws of the Government under which she lives. If I maintain that proposition, as a matter of course she has committed no offense, and is entitled to be discharged at your hands.

But, beyond that, whether she was a legal voter or not, whether she was entitled to vote or not, if she sincerely believed that she had a right to vote, and offered her ballot in good faith, under that belief, whether right or wrong,

by the laws of this country she is guilty of no crime. I apprehend that that proposition, when it is discussed, will be maintained with a clearness and force that shall leave no doubt upon the mind of the Court or upon your minds as the gentlemen of the jury. If I maintain that proposition here, then the further question and the only question which, in my judgment, can come before you to be passed upon by you as a question of fact is whether or not she did vote in good faith, believing that she had a right to vote.

The public prosecutor assumes that, however honestly she may have offered her vote, however sincerely she may have believed that she had a right to vote, if she was mistaken in that judgment, her offering her vote and its being received makes a criminal offense—a proposition to me most abhorrent, as I believe it will be equally abhorrent to your judgment.

Before the registration, and before this election, Miss Anthony called upon me for advice upon the question whether, under the Fourteenth Amendment of the Constitution of the United States, she had a right to vote. I had not examined the question. I told her I would examine it and give her my opinion upon the question of her legal right. She went away and came again after I had made the examination. I advised her that she was as lawful a voter as I am, or as any other man is, and advised her to go and offer her vote. I may have been mistaken in that, and if I was mistaken, I believe she acted in good faith. I believe she acted according to her right as the law and Constitution gave it to her. But whether she did or not, she acted in the most perfect good faith, and if she made a mistake, or if I made one, that is not reason for committing her to a felon's cell.

For the second time in my life, in my professional practice, I am under the necessity of offering myself as a witness for my client.

## WITNESSES FOR THE DEFENDANT.

*Henry R. Selden.* Before the last election, Miss Anthony called upon me for advice, upon the question whether she was or was not a legal voter. I examined the question, and gave her my opinion, unhesitatingly, that the laws and Constitution of the United States, authorized her to

vote, as well as they authorize any man to vote; advised her to have her name placed upon the registry and to vote at the election, if the inspectors should receive her vote. I gave the advice in good faith, believing it to be accurate, and I believe it to be accurate still.

*Mr. Selden.* I propose to call Miss Anthony as to the fact of her voting—on the question of the intention or belief under which she voted.

*Mr. Crowley.* She is not competent as a witness in her own behalf.

The COURT held the evidence incompetent.

*John E. Pound.* (Called by the United States.) During November and December 1872 and January 1873, I was assistant United States District Attorney for the Northern District of New York. Attended an examination before United States District Attorney Storrs in Rochester, where Miss Anthony was examined as a witness in her own behalf.

*Mr. Crowley.* Did she, upon that occasion, state that she consulted or talked with Judge Henry R. Selden, of Rochester, in relation to her right to vote?

*Mr. Selden.* I object to that upon the ground that it is incompetent, that if they refuse to allow her to be sworn here, they should be excluded from producing any evidence that she gave elsewhere, especially when they want to give the version which the United States officer took of her evidence.

The COURT. Go on.

*Mr. Crowley.* Did she state

on that examination, under oath, that she had talked or consulted with Judge Henry R. Selden in relation to her right to vote? Was she asked, upon that examination, if the advice given her by Judge Henry R. Selden would or did make any difference in her action in voting, or in substance that? She stated on the cross-examination, "I should have made the same endeavor to vote that I did had I not consulted Judge Selden. I didn't consult any one before I registered. I was not influenced by his advice in the matter at all; have been resolved to vote, the first time I was at home thirty days, for a number of years."

*Mr. Van Voorhis.* Was she asked there if she had any doubt about her right to vote, and did she answer "Not a particle"? She stated "Had no doubt as to my right to vote," on the direct examination. There was a steno-

graphic reporter there, was there not? A reporter was there taking notes. Was not this question put to her "Did you have any doubt yourself of your right to vote?" and did she not answer "Not a particle"?

The COURT. Well, he says so, that she had no doubt of her right to vote.

Mr. Selden. I beg leave to

state, in regard to my own testimony, Miss Anthony informs me that I was mistaken in the fact that my advice was before her registry. It was my recollection that it was on her way to the registry, but she states to me now that she was registered and came immediately to my office. In that respect I was under a mistake.

Mr. Selden. The defendant is indicted under the Nineteenth section of the Act of Congress of May 31, 1870,<sup>a</sup> for "voting without having a lawful right to vote."

The words of the Statute, so far as they are material in this case, are as follows: "If at any election for representative or delegate in the Congress of the United States, any person shall knowingly . . . vote without having a lawful right to vote . . . every such person shall be deemed guilty of a crime, . . . and on conviction thereof shall be punished by a fine not exceeding \$500, or by imprisonment for a term not exceeding three years, or by both, in the discretion of the Court, and shall pay the costs of prosecution."

The only alleged ground of illegality of the defendant's vote is that she is a woman. If the same act had been done by her brother under the same circumstances, the act would have been not only innocent but honorable and laudable; but having been done by a woman it is said to be a crime. The crime therefore consists not in the act done, but in the simple fact that the person doing it was a woman and not a man. I believe this is the first instance in which a woman has been arraigned in a criminal court, merely on account of her sex.

If the advocates of female suffrage had been allowed to choose the point of attack to be made upon their position, they could not have chosen it more favorably for themselves; and I am disposed to thank those who have been in-

<sup>a</sup> 16 St. at L., 144.

strumental in this proceeding, for presenting it in the form of a criminal prosecution.

Women have the same interest that men have in the establishment and maintenance of good government; they are to the same extent as men bound to obey the laws; they suffer to the same extent by bad laws, and profit to the same extent by good laws; and upon principles of equal justice, as it would seem, should be allowed equally with men, to express their preference in the choice of law-makers and rulers. But however that may be, no greater absurdity, to use no harsher term, could be presented, than that of rewarding men and punishing women, for the same act, without giving to women any voice in the question which should be rewarded, and which punished.

I am aware, however, that we are here to be governed by the Constitution and laws as they are, and that if the defendant has been guilty of violating the law, she must submit to the penalty, however unjust or absurd the law may be. But courts are not required to so interpret laws or constitutions as to produce either absurdity or injustice, so long as they are open to a more reasonable interpretation. This must be my excuse for what I design to say in regard to the propriety of female suffrage, because with that propriety established there is very little difficulty in finding sufficient warrant in the Constitution for its exercise.

This case, in its legal aspects, presents three questions, which I purpose to discuss.

1. Was the defendant legally entitled to vote at the election in question?

2. If she was not entitled to vote, but believed that she was, and voted in good faith in that belief, did such voting constitute a crime under the statute before referred to?

3. Did the defendant vote in good faith in that belief?

If the first question be decided in accordance with my views, the other questions become immaterial; if the second be decided adversely to my views, the first and third be-

come immaterial. The two first are questions of law to be decided by the Court, the other is a question for the jury.

The COURT. I suggest that the argument be confined to the legal questions, and the argument on the other question suspended, until my opinion on those questions shall be made known.

Mr. Selden. My first position is that the defendant had the same right to vote as any other citizen who voted at that election.

Before proceeding to the discussion of the purely legal question, I desire, as already intimated, to pay some attention to the propriety and justice of the rule which I claim to have been established by the Constitution.

Miss Anthony, and those united with her in demanding the right of suffrage, claim, and with a strong appearance of justice, that upon the principles upon which our government is founded, and which lie at the basis of all just government, every citizen has a right to take part, upon equal terms with every other citizen, in the formation and administration of government. This claim on the part of the female sex presents a question the magnitude of which is not well appreciated by the writers and speakers who treat it with ridicule. Those engaged in the movement are able, sincere and earnest women, and they will not be silenced by such ridicule, nor even by the villainous caricatures of Nast.<sup>22</sup> On the contrary, they justly place all those things to the account of the wrongs which they think their sex has suffered. They believe, with an intensity of feeling which men who have not associated with them have not yet learned, that their sex has not had, and has not now, its just and true position in the organization of government and society. They may be wrong in their position,

<sup>22</sup> NAST, Thomas. Born 1840, in Bavaria, but began his career as a caricaturist very early in his life in New York, and his cartoons in Harper's Weekly made him famous for many years all over the land.



but they will not be content until their arguments are fairly, truthfully and candidly answered.

In the most celebrated document which has been put forth on this side of the Atlantic, our ancestors declared that "governments derive their just powers from the consent of the governed."

Blackstone says, "The lawfulness of punishing such criminals (i. e., persons offending merely against the laws of society) is founded upon this principle: that the law by which they suffer was made by their own consent; it is a part of the original contract into which they entered when first they engaged in society; it was calculated for and has long contributed to their own security."

Quotations, to an unlimited extent, containing similar doctrines from eminent writers, both English and American, on government, from the time of John Locke to the present day, might be made. Without adopting this doctrine which bases the rightfulness of government upon the consent of the governed, I claim that there is implied in it the narrower and unassailable principle that all citizens of a state, who are bound by its laws, are entitled to an equal voice in the making and execution of such laws. The doctrine is well stated by Godwin in his treatise on Political Justice. He says: "The first and most important principle that can be imagined relative to the form and structure of government, seems to be this: that as government is a transaction in the name and for the benefit of the whole, every member of the community ought to have some share in its administration."

Again, "Government is a contrivance instituted for the security of individuals; and it seems both reasonable that each man should have a share in providing for his own security, and probably, that partiality and cabal should by this means be most effectually excluded."

And again, "To give each man a voice in the public concerns comes nearest to that admirable idea of which we should never lose sight, the uncontrolled exercise of private

judgment. Each man would thus be inspired with a consciousness of his own importance, and the slavish feelings that shrink up the soul in the presence of an imagined superior would be unknown."

The mastery which this doctrine, whether right or wrong, has acquired over the public mind, has produced, as its natural fruit, the extension of the right of suffrage to all the adult male population in nearly all the states of the Union; a result which was well epitomized by President Lincoln, in the expression, "government by the people for the people."

This extension of the suffrage is regarded by many as a source of danger to the stability of free government. I believe it furnishes the greatest security for free government, as it deprives the mass of the people of all motive for revolution; and that government so based is most safe, not because the whole people are less liable to make mistakes in government than a select few, but because they have no interest which can lead them to such mistakes, or to prevent their correction when made. On the contrary, the world has never seen an aristocracy, whether composed of few or many, powerful enough to control a government, who did not honestly believe that their interest was identical with the public interest, and who did not act persistently in accordance with such belief; and, unfortunately, an aristocracy of sex has not proved an exception to the rule. The only method yet discovered of overcoming this tendency to the selfish use of power, whether consciously or unconsciously, by those possessing it, is the distribution of the power among all who are its subjects. Short of this the name free government is a misnomer.

This principle, after long strife, not yet entirely ended, has been, practically at least, very generally recognized on this side of the Atlantic, as far as relates to men; but when the attempt is made to extend it to women, political philosophers and practical politicians, those "inside of politics," two classes not often found acting in concert, join

in denouncing it. It remains to be determined whether the reasons which have produced the extension of the franchise to all adult men, do not equally demand its extension to all adult women. If it be necessary for men that each should have a share in the administration of government for his security, and to exclude partiality, as alleged by Godwin, it would seem to be equally, if not more, necessary for women, on account of their inferior physical power: and if, as is persistently alleged by those who sneer at their claims, they are also inferior in mental power, that fact only gives additional weight to the argument in their behalf, as one of the primary objects of government, as acknowledged on all hands, is the protection of the weak against the power of the strong.

I can discover no ground consistent with the principle on which the franchise has been given to all men, upon which it can be denied to women. The principal argument against such extension, so far as argument upon that side of the question has fallen under my observation, is based upon the position that women are represented in the government by men, and that their rights and interests are better protected through that indirect representation than they would be by giving them a direct voice in the government.

The teachings of history in regard to the condition of women under the care of these self-constituted protectors, to which I can only briefly allude, show the value of this argument as applied to past ages; and in demonstration of its value as applied to more recent times, even at the risk of being tedious, I will give some examples from my own professional experience. I do this because nothing adds more to the efficacy of truth than the translation of the abstract into the concrete. Withholding names, I will state the facts with fullness and accuracy.

An educated and refined woman, who had been many years before deserted by her drunken husband, was living in a small village of Western New York, securing, by great

economy and intense labor in fine needlework, the means of living, and of supporting her two daughters at an academy, the object of her life being to give them such an education as would enable them to become teachers, and thus secure to them some degree of independence when she could no longer provide for them. The daughters were good scholars, and favorites in the school, so long as the mother was able to maintain them there. A young man, the nephew and clerk of a wealthy but miserly merchant, became acquainted with the daughters, and was specially attentive to the older one. The uncle disapproved of the conduct of his nephew, and failing to control it by honorable means, resorted to the circulation of the vilest slanders against mother and daughters. He was a man of wealth and influence. They were almost unknown. The mother had but recently come to the village, her object having been to secure to her daughters the educational advantages which the academy afforded. Poverty, as well as perhaps an excusable if not laudable pride, compelled her to live in obscurity, and consequently the assault upon their characters fell upon her and her daughters with crushing force. Her employment mainly ceased, her daughters were of necessity withdrawn from school, and all were deprived of the means, from their own exertions, of sustaining life. Had they been in fact the harlots which the miserly scoundrel represented them to be, they would not have been so utterly powerless to resist his assault. The mother in her despair naturally sought legal redress. But how was it to be obtained? By the law the wife's rights were merged in those of the husband. She had in law no individual existence, and consequently no action could be brought by her to redress the grievous wrong; indeed according to the law she had suffered no wrong, but the husband has suffered all, and was entitled to all the redress. Where he was the lady did not know; she had not heard from him for many years. Her counsel, however, ventured to bring an action in her behalf, joining the husband's name with hers, as

the law required. When the cause came to trial the defendant made no attempt to sustain the charges which he had made, well knowing they were as groundless as they were cruel; but he introduced and proved a release of the cause of action, signed by the husband, reciting a consideration of fifty dollars paid to him. The defendant's counsel had some difficulty in proving the execution of the release, and was compelled to introduce as a witness, the constable who had been employed to find the vagabond husband and obtain his signature. His testimony disclosed the facts that he found the husband in the forest in one of our northeastern counties, engaged in making shingles, (presumably stealing timber from the public lands and converting it into the means of indulging his habits of drunkenness,) and only five dollars of the fifty mentioned in the release had in fact been paid. The Court held, was compelled to hold, that the party injured in view of the law, had received full compensation for the wrong—and the mother and daughters with no means of redress were left to starve. This was the act of the representative of the wife and daughters to whom we are referred, as a better protector of their rights than they themselves could be.

It may properly be added, that if the action had proceeded to judgment without interference from the husband, and such amount of damages had been recovered as a jury might have thought it proper to award, the money would have belonged to the husband, and the wife could not lawfully have touched a cent of it. Her attorney might, and doubtless would have paid it to her, but he could only have done so at the peril of being compelled to pay it again to the drunken husband if he had demanded it.

In another case, two ladies, mother and daughter, some time prior to 1860 came from an eastern county of New York to Rochester, where a *habeas corpus* was obtained for a child of the daughter, less than two years of age. It appeared on the return of the writ, that the mother of the child had been previously abandoned by her husband,

who had gone to a western state to reside, and his wife had returned with the child to her mother's house, and had resided there after her desertion. The husband had recently returned from the west, had succeeded in getting the child into his custody, and was stopping over night with it in Rochester on the way to his western home. No misconduct on the part of the wife was pretended, and none on the part of the husband, excepting that he had gone to the west leaving his wife and child behind, no cause appearing, and had returned, and somewhat clandestinely obtained possession of the child. The Judge, following Blackstone's views of husband's rights, remanded the infant to the custody of the father. He thought the law required it, perhaps it did; but if mothers had had a voice, either in making or in administering the law, I think the result would have been different. The distress of the mother on being thus separated from her child can be better imagined than described. The separation proved a final one, as in less than a year neither father nor mother had any child on earth to love or care for. Whether the loss to the little one of a mother's love and watchfulness had any effect upon the result cannot, of course, be known.

The state of the law a short time since, in other respects, in regard to the rights of married women, shows what kind of security had been provided for them by their assumed representatives. Prior to 1848 all the personal property of every woman on marriage became the absolute property of the husband—the use of all her real estate became his during coverture, and on the birth of a living child, it became his during his life. He could squander it in dissipation or bestow it upon harlots, and the wife could not touch or interfere with it. Prior to 1860, the husband could by will take the custody of his infant children away from the surviving mother, and give it to whom he pleased—and he could in like manner dispose of the control of the children's property, after his death, during their minority, without the mother's consent.

In most of these respects the state of the law has undergone great changes within the last twenty-five years. The property, real and personal, which a woman possesses before marriage, and such as may be given to her during coverture, remains her own, and is free from the control of the husband. If a married woman is slandered she can prosecute in her own name the slanderer and recover to her own use damages for the injury. The mother now has an equal claim with the father to the custody of their minor children, and in case of controversy on the subject, courts may award the custody to either in their discretion. The husband cannot now by will effectually appoint a guardian for his infant children without the consent of the mother, if living.

These are certainly great ameliorations of the law; but how have they been produced? Mainly as the result of the exertions of a few heroic women, one of the foremost of whom is her who stands arraigned as a criminal before this Court to-day. For a thousand years the absurdities and cruelties to which I have alluded have been embedded in the common law, and in the statute books, and men have not touched them, and would not until the end of time, had they not been goaded to it by the persistent efforts of the noble women to whom I have alluded.

Much has been done, but much more remains to be done by women. If they had possessed the elective franchise, the reforms which have cost them a quarter of a century of labor would have been accomplished in a year. They are still subject to taxation upon their property, without any voice as to the levying or destination of the tax; and are still subject to laws made by men, which subject them to fine and imprisonment for the same acts which men do with honor and reward—and when brought to trial no woman is allowed a place on the bench or in the jury box, or a voice in her behalf at the bar. They are bound to suffer the penalty of such laws, made and administered solely by men, and to be silent under the infliction. Give

them the ballot, and, although I do not suppose that any great revolution will be produced, or that all political evils will be removed, (I am not a believer in political panaceas,) but if I mistake not, valuable reforms will be introduced which are not now thought of. Schools, almshouses, hospitals, drinking saloons, and those worse dens which are destroying the morals and the constitutions of so many of the young of both sexes, will feel their influence to an extent now little dreamed of. At all events women will not be taxed without an opportunity to be heard, and will not be subject to fine and imprisonment by laws made exclusively by men for doing what it is lawful and honorable for men to do.

It may be said in answer to the argument in favor of female suffrage derived from the cases to which I have referred, that men, not individually, but collectively, are the natural and appropriate representatives of women, and that, notwithstanding cases of individual wrong, the rights of women are, on the whole, best protected by being left to their care. It must be observed, however, that the cases which I have stated and which are only types of thousands like them, in their cruelty and injustice, are the result of ages of legislation by these assumed protectors of women. The wrongs were less in the men than in the laws which sustained them, and which contained nothing for the protection of the women.

But passing this view, let us look at the matter historically and on the broader field. If Chinese women were allowed an equal share with the men in shaping the laws of that great empire, would they subject their female children to torture with bandaged feet, through the whole period of childhood and growth, in order that they might be cripples for the residue of their lives? If Hindoo women could have shaped the laws of India, would widows for ages have been burned on the funeral pyres of their deceased husbands? If Jewish women had had a voice in framing Jewish laws, would the husband, at his own pleas-



ure, have been allowed to "write his wife a bill of divorcement and give it in her hand, and send her out of his house"? Would women in Turkey or Persia have made it a heinous, if not capital, offense for a wife to be seen abroad with her face not covered by an impenetrable veil? Would women in England, however learned, have been for ages subjected to execution for offenses for which men, who could read, were only subjected to burning in the hand and a few months' imprisonment?

The principle which governs in these cases, or which has done so hitherto, has been at all times and everywhere the same. Those who succeed in obtaining power, no matter by what means, will, with rare exceptions, use it for their own exclusive benefit. Often, perhaps generally, this is done in the honest belief that such use is for the best good of all who are affected by it. A wrong, however, to those upon whom it is inflicted, is none the less a wrong by reason of the good motives of the party by whom it is inflicted.

The condition of subjection in which women have been held is the result of this principle; the result of superior strength, not of superior rights, on the part of men. Superior strength, combined with ignorance and selfishness, but not with malice. It is a relic of the barbarism in the shadow of which nations have grown up. Precisely as nations have receded from barbarism the severity of that subjection has been relaxed. So long as merely physical power governed in the affairs of the world, the wrongs done to women were without the possibility of redress or relief; but since nations have come to be governed by laws, there is room to hope, though the process may still be a slow one, that injustice in all its forms, or at least political injustice, may be extinguished. No injustice can be greater than to deny to any class of citizens not guilty of crime, all share in the political power of a state, that is, all share in the choice of rulers, and in the making and administration of the laws. Persons to which such share is denied,

are essentially slaves, because they hold their rights, if they can be said to have any, subject to the will of those who hold the political power. For this reason it has been found necessary to give the ballot to the emancipated slaves. Until this was done their emancipation was far from complete. Without a share in the political powers of the state, no class of citizens has any security for its rights, and the history of nations, to which I briefly alluded, shows that women constitute no exception to the universality of this rule.

Great errors, I think, exist in the minds of both the advocates and the opponents of this measure in their anticipation of the immediate effects to be produced by its adoption. On the one hand it is supposed by some that the character of women would be radically changed—that they would be unsexed, as it were, by clothing them with political rights, and that instead of modest, amiable and graceful beings, we should have bold, noisy and disgusting political demagogues, or something worse, if anything worse can be imagined. I think those who entertain such opinions are in error. The innate character of women is the result of God's laws, not of man's, nor can the laws of man affect that character beyond a very slight degree. Whatever rights may be given to them, and whatever duties may be charged upon them by human laws, their general character will remain unchanged. Their modesty, their delicacy, and intuitive sense of propriety, will never desert them, into whatever new positions their added rights or duties may carry them.

So far as women, without change of character as women, are qualified to discharge the duties of citizenship, they will discharge them if called upon to do so, and beyond that they will not go. Nature has put barriers in the way of any excessive devotion of women to public affairs, and it is not necessary that nature's work in that respect should be supplemented by additional barriers invented by men. Such offices as women are qualified to fill will be sought by

those who do not find other employment, and others they will not seek, or if they do, will seek in vain. To aid in removing as far as possible the disheartening difficulties which women dependent upon their own exertions encounter, it is, I think, desirable that such official positions as they can fill should be thrown open to them, and that they should be given the same power that men have to aid each other by their votes. I would say, remove all legal barriers that stand in the way of their finding employment, official or unofficial, and leave them as men are left, to depend for success upon their character and abilities. As long as men are allowed to act as milliners, with what propriety can they exclude women from the post of school commissioners when chosen to such positions by their neighbors? To deny them such rights, is to leave them in a condition of political servitude as absolute as that of the African slaves before their emancipation. This conclusion is readily to be deduced from the opinion of Chief Justice Jay in the case of *Chisholm v. Georgia*,<sup>sb</sup> although the learned Chief Justice had of course no idea of any such application as I make of his opinion.

The action was assumpsit by a citizen of the State of South Carolina, and the question was, whether the United States Court had jurisdiction, the State of Georgia declining to appear. The Chief Justice, in the course of his opinion, after alluding to the feudal idea of the character of the sovereign in England, and giving some of the reasons why he was not subject to suit before the courts of the kingdom, says:

“The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the prince and the subject. No such ideas obtain here. At the revolution the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves

<sup>sb</sup> 2 Dall., 419-471.

among us may be so called), and have none to govern but themselves; the citizens of America are equal as fellow-citizens, and as joint tenants in the sovereignty."

Now I beg leave to ask, in case this charge against Miss Anthony can be sustained, what equality and what sovereignty is enjoyed by the half of the citizens of these United States to which she belongs? Do they not, in that event, occupy, politically, exactly the position which the learned Chief Justice assigns to the African slaves? Are they not shown to be subjects of the other half, who are the sovereigns? And is not their political subjection as absolute as was that of the African slaves? If that charge has any basis to rest upon, the learned Chief Justice was wrong. The sovereigns of this country, according to the theory of this prosecution, are not sovereigns without subjects. Though two or three millions of their subjects have lately ceased to be such, and have become freemen, they still hold twenty millions of subjects in absolute political bondage.

If it be said that my language is stronger than the facts warrant, I appeal to the record in this case for its justification.

As deductions from what has been said, I respectfully insist, first, That upon the principles upon which our government is based, the privilege of the elective franchise cannot justly be denied to women. Second. That women need it for their protection. Third. That the welfare of both sexes will be promoted by granting it to them.

Having occupied much more time than I intended in showing the justness and propriety of the claim made by my client to the privileges of a voter, I proceed to the consideration of the present state of the law on that subject.

It would not become me, however clear my own convictions may be on the subject, to assert the right of women, under our Constitution and laws as they now are, to vote at presidential and congressional elections, is free from

doubt, because very able men have expressed contrary opinions on that question, and, so far as I am informed, there has been no authoritative adjudication upon it; or, at all events, none upon which the public mind has been content to rest as conclusive. I proceed, therefore, to offer such suggestions as occur to me, and to refer to such authorities bearing upon the question, as have fallen under my observation, hoping to satisfy your honor, not only that my client has committed no criminal offense, but that she has done nothing which she had not a legal and constitutional right to do.

It is not claimed that, under our State Constitution and the laws made in pursuance of it, women are authorized to vote at elections, other than those of private corporations, and, consequently, the right of Miss Anthony to vote at the election in question, can only be established by reference to an authority superior to and sufficient to overcome the provisions of our State Constitution. Such authority can only be found, and I claim that it is found, in the Constitution of the United States. I refer to the article requiring each state to appoint its Senators and Representatives; to the provision that the citizens of each state are entitled to the privileges and immunities of citizens of the several states and to the Thirteenth, Fourteenth and Fifteenth amendments. Article I, Section 2. "The House of Representatives shall be composed of members chosen every second year, by the people of the several States; and the electors in each state shall have the qualifications for electors of the most numerous branch of the State legislature." The same Article, Section 3, "The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof for six years; and each senator shall have one vote." Article II, Section 1. "Each state shall appoint in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress." Article IV, Section 2. "The citizens

of each state shall be entitled to all the privileges and immunities of citizens in the several states.”

The Thirteenth amendment says that neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” “That all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws and that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude.” By reference to the provisions of the original Constitution, here recited, it appears that prior to the Thirteenth, if not until the Fourteenth, amendment, the whole power over the elective franchise, even in the choice of Federal officers, rested with the states. The Constitution contains no definition of the term “citizen,” either of the United States, or of the several states, but contents itself with the provision that “the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.” The states were thus left free to place such restrictions and limitations upon the “privileges and immunities” of citizens as they saw fit, so far as is consistent with a republican form of government, subject only to the condition that no state could place restrictions upon the “privileges or immunities” of the citizens of any other state, which would not be applicable to its own citizens under like circumstances.

It will be seen, therefore, that the whole subject, as to what should constitute the “privileges and immunities”

of the citizen being left to the states, no question, such as we now present, could have arisen under the original Constitution of the United States.

But now, by the Fourteenth amendment, the United States have not only declared what constitutes citizenship, both in the United States and in the several states, securing the rights of citizens to "all persons born or naturalized in the United States;" but have absolutely prohibited the states from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States."

By virtue of this provision, I insist that the act of Miss Anthony in voting was lawful.

It has never, since the adoption of the Fourteenth amendment, been questioned, and cannot be questioned, that women as well as men are included in the terms of its first section, nor that the same "privileges and immunities of citizens" are equally secured to both.

What, then, are the "privileges and immunities of citizens of the United States" which are secured against such abridgement, by this section? I claim that these terms not only include the right of voting for public officers, but that they include that right as pre-eminently the most important of all the privileges and immunities to which the section refers. Among these privileges and immunities may doubtless be classed the right of life and liberty, to the acquisition and enjoyment of property, and to the free pursuit of one's own welfare, so far as such pursuit does not interfere with the rights and welfare of others; but what security has any one for the enjoyment of these rights when denied any voice in the making of the laws, or in the choice of those who make, and those who administer them? The possession of this voice, in the making and administration of the laws—this political right—is what gives security and value to the other rights, which are merely personal, not political. A person deprived of political rights is essentially a slave, because he holds his personal rights subject

to the will of those who possess the political power. This principle constitutes the very corner-stone of our government—indeed, of all republican government. Upon that basis our separation from Great Britain was justified. "Taxation without representation is tyranny." This famous aphorism of James Otis, although sufficient for the occasion when it was put forth, expresses but a fragment of the principle, because government can be oppressive through means of many appliances besides that of taxation. The true principle is, that all government over persons deprived of any voice in such government, is tyranny. That is the principle of the Declaration of Independence. We were slow in allowing its application to the African race, and have been slower still in allowing its application to women; but it has been done by the Fourteenth amendment, rightly construed, by a definition of "citizenship," which includes women as well as men, and in the declaration that "the privileges and immunities of citizens shall not be abridged." If there is any privilege of the citizen which is paramount to all others, it is the right of suffrage; and in a constitutional provision, designed to secure the most valuable rights of the citizen, the declaration that the privileges and immunities of the citizen shall not be abridged, must, as I conceive, be held to secure that right before all others. It is obvious, when the entire language of the section is examined, not only that this declaration was designed to secure the citizen this political right, but that such was its principal, if not its sole object, those provisions of the section which follow it being devoted to securing the personal rights of "life, liberty, property, and the equal protection of the laws." The clause on which we rely, to wit: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," might be stricken out of the section, and the residue would secure to the citizen every right which is now secured, excepting the political rights of voting and holding office. If the clause in question does not secure



those political rights, it is entirely nugatory, and might as well have been omitted.

If we go to the lexicographers and to the writers upon law, to learn what are the privileges and immunities of the "citizen" in a republican government, we shall find that the leading feature of citizenship is the enjoyment of the right of suffrage. The definition of the term "citizen" by Bouvier is: "One who under the Constitution and laws of the United States, has a right to vote for Representatives in Congress, and other public officers, and who is qualified to fill offices in the gift of the people." By Worcester—"An inhabitant of a republic who enjoys the rights of a freeman, and has a right to vote for public officers." By Webster—"In the United States, a person, native or naturalized, who has the privilege of exercising the elective franchise, or the qualifications which enable him to vote for rulers, and to purchase and hold real estate."

The meaning of the word "citizen" is directly and plainly recognized by the latest amendment of the Constitution (the Fifteenth). "The right of the citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude." This clause assumes that the right of citizens, as such, to vote, is an existing right. Mr. Richard Grant White, in his late work on Words and their Uses, says of the word citizen: "A citizen is a person who has certain political rights, and the word is properly used only to imply or suggest the possession of these rights."<sup>9</sup>

Beyond question, the first section of the Fourteenth amendment, by placing the citizenship of women upon a par with that of men, and declaring that the "privileges and immunities" of the citizen shall not be abridged, has secured to women, equally with men, the right of suffrage,

<sup>9</sup> Mr. Selden cited also *Corfield v. Coryell*, 4 Wash. C. C. 380. *Amy v. Smith*, 1 Litt (Ky.) 326.

unless than conclusion is overthrown by some other provision of the Constitution.

It is not necessary for the purposes of this argument to claim that this amendment prohibits a state from making or enforcing any law whatever, regulating the elective franchise, or prescribing the conditions upon which it may be exercised. But we do claim that in every republic the right of suffrage, in some form, and to some extent, is not only one of the privileges of its citizens, but is the first, most obvious and most important of all the privileges they enjoy; that in this respect all citizens are equal, and that the effect of this amendment is, to prohibit the states from enforcing any law which denies this right to any of its citizens, or which imposes any restrictions upon it, which are inconsistent with a republican form of government. Within this limit, it is unnecessary for us to deny that the states may still regulate and control the exercise of the right.

The only provisions of the Constitution, which it can be contended conflict with the construction which has here been put upon the first section of the Fourteenth amendment, are the Fifteenth amendment, and the second section of the Fourteenth.

In regard to the Fifteenth amendment, I shall only say, that if my interpretation of the Fourteenth amendment is correct, there was still an object to be accomplished and which was accomplished by the Fifteenth. The prohibition of any action abridging the privileges and immunities of citizens, contained in the Fourteenth amendment, applies only to the states, and leaves the United States government free to abridge the political privileges and immunities of citizens of the United States, as such, at its pleasure. By the Fifteenth amendment both the United States and the state governments, are prohibited from exercising this power, "on account of race, color, or previous condition of servitude" of the citizen.

The first remark to be made upon the second section of

the Fourteenth amendment is, that it does not give was not designed to give to the states any power to or abridge the right of any citizen to exercise the electoral franchise. So far as it touches that subject it was designed to be restrictive upon the states. It gives to them no power whatever. It takes away no power, but it gives none, if the states possess the power to deny or abridge the right of citizens to vote, it must be derived from some other provision of the Constitution. I believe none such can be found, which was not necessarily abrogated by the first section of this amendment.

It may be conceded that the persons who prepared the first section supposed that, by other parts of the Constitution or in some other way, the states would still be authorized notwithstanding the provisions of the first section, to deny to the citizens the privilege of voting, as mentioned in the second section; but their mistake cannot be held to add to or to take from the other provisions of the Constitution. It is very clear that they did not intend, by this section, to give to the states any such power, but, believing that the states possessed it, they designed to hold the prospect of reduction of their representation in Congress in terror over them to prevent them from exercising it. They seem not to have been able to emancipate themselves from the influence of the original Constitution which conceded this power to the states, or to have realized the fact that the first section of the amendment, when adopted, would wholly deprive the states of that power. But those who prepare Constitutions are never those who adopt them, and consequently the views of those who frame them have little or no bearing upon their interpretation. The question for consideration here is, what the people, who through their representatives in the legislatures, adopted the amendments, understood, or must be presumed to have understood, from their language. They must be presumed to have known that the "privileges and immunities" of citizens which were secured to them by the first section beyond the power of abridgment by the

states, gave them the right to exercise the elective franchise, and they certainly cannot be presumed to have understood that the second section, which was also designed to be restrictive upon the states, would be held to confer by implication a power upon them, which the first section in the most express terms prohibited.

It has been, and may be again asserted, that the position which I have taken in regard to the second section is inadmissible, because it renders the section nugatory. That is, as I hold, an entire mistake. The leading object of the second section was the readjustment of the representation of the states in Congress, rendered necessary by the abolition of chattel slavery (not of political slavery), effected by the Thirteenth amendment. This object the section accomplishes, and in this respect it remains wholly untouched, by my construction of it.

Neither do I think the position tenable which has been taken by one tribunal, to which the consideration of this subject was presented, that the constitutional provision does not execute itself.

The provisions on which we rely were negative merely, and were designed to nullify existing as well as any future state legislation interfering with our rights. This result was accomplished by the Constitution itself. Undoubtedly before we could exercise our right, it was necessary that there should be a time and place appointed for holding the election and proper officers to hold it, with suitable arrangements for receiving and counting the votes. All this was properly done by existing laws, and our right being made complete by the Constitution, no further legislation was required in our behalf. When the state officers attempted to interpose between us and the ballot-box the state Constitution or state law, whether ancient or recent, abridging or denying our equal right to vote with other citizens, we had but to refer to the United States Constitution, prohibiting the states from enforcing any such constitutional provision or

law, and our rights were complete; we needed neither Congressional or state legislation in aid of them.

The opinion of Mr. Justice Bradley, in a case in the United States Circuit Court in New Orleans<sup>10</sup> would seem to be decisive of this question, although the right involved in the case was not that of the elective franchise. The learned justice says: "It was very ably contended on the part of the defendants that the Fourteenth amendment was intended only to secure to all citizens equal capacities before the law. That was at first our view of it. But it does not so read. The language is: 'No state shall abridge the privileges or immunities of citizens of the United States.' What are the privileges and immunities of citizens? Are they capacities merely? Are they not also rights?"

Senator Carpenter, who took part in the discussion of the Fourteenth amendment in the Senate, and aided in its passage, says: "The Fourteenth amendment executes itself in every state of the Union . . . It is thus the will of the United States in every state, and silences every state Constitution, usage or law which conflicts with it. . . . And if this provision does protect the colored citizen, then it protects every citizen, black or white, male or female. . . . And all the privileges and immunities which I vindicate to a colored citizen, I vindicate to our mothers, our sisters and our daughters."<sup>11</sup>

It has been said, with how much or how little truth I do not know, that the subject of securing to women the elective franchise was not considered in the preparation, or in the adoption of these amendments. It is wholly immaterial whether that was so or not. It is never possible to arrive at the intention of the people in adopting constitutions, except by referring to the language used. As is said by Mr. Cooley, "the intent is to be found in the instrument itself" and to that I have confined my remarks. It is not a new thing for constitutional and legislative acts to have an effect be-

<sup>10</sup> 1 Abb. U. S. Rep., 402.

<sup>11</sup> *Chicago Legal News*, No. 15.

yond the anticipation of those who framed them. It is undoubtedly true, that in exacting *Magna Charta* from King John, the Barons of England provided better securities for the rights of the common people that they were aware of at the time, although the rights of the common people were neither forgotten nor neglected by them. It has also been said, perhaps with some truth, that the framers of the original Constitution of the United States "builded better than they knew;" and it is quite possible that in framing the amendments under consideration, those engaged in doing it have accomplished a much greater work than they were at the time aware of. I am quite sure that it will be fortunate for the country, if this great question of female suffrage, than which few greater were ever presented for the consideration of any people, shall be found, almost unexpectedly, to have been put at rest.

The opinion of Mr. Justice Bradley, in regard to this amendment, in the case before referred to, if I understand it, corresponds very nearly with what I have here said. The learned judge, in one part of his opinion, says: "It is possible that those who framed the article were not themselves aware of the far-reaching character of its terms. They may have had in mind but one particular phase of social and political wrong, which they desired to redress—yet, if the amendment, as framed and expressed, does, in fact, bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach social evils which were never before prohibited by constitutional amendment, it is to be presumed that the American people, in giving it their imprimatur, understood what they were doing, and meant to decree what has, in fact, been decreed. . . . It embraces much more. The 'privileges and immunities' secured by the original Constitution were only such as each state gave its own citizens. Each was prohibited from discriminating in favor of its own citizens, and against the citizens of other states. But the Fourteenth amendment prohibits any state

from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges, but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired.'"<sup>12</sup>

It will doubtless be urged as an objection to my position (that citizenship carries with it the right to vote) that it would, in that case, follow that infants and lunatics, as well as adults and persons of sound mind, are citizens and would also have that right. This objection, which appears to have great weight with certain classes of persons, is entirely without force. It takes no note of the familiar fact that every legislative provision, whether constitutional or statutory, which confers any discretionary power, is always confined in its operation to persons who are *compos mentis*. It is wholly unnecessary to except idiots and lunatics out of any such statute. They are excluded from the very nature of the case. The contrary supposition would be simply absurd. And, in respect to every such law, infants, during their minority, are in the same class. But are women, who are not infants, ever included in this category? Does any such principle of exclusion apply to them? Not at all. On the contrary, they stand in this respect, upon the same footing as men, with the sole exception of the right to vote and the right to hold office. In every other respect, whatever rights and powers are conferred upon persons by law may be exercised by women as well as by men. They may transact any kind of business for themselves, or as agents or trustees for others; may be executors or administrators, with the same powers and responsibilities as men; and it ought not to be a matter of surprise or regret that they are now placed, by the Fourteenth amendment, in other respects upon a footing of perfect equality.

Although not directly connected with the argument as to the right secured to women by the Constitution, I deem it

<sup>12</sup> 1 Abbott's U. S. Rep., 397.

not improper to allude briefly to some of the popular objections against the propriety of allowing females the privilege of voting. I do this because I know from past experience that these popular objections, having no logical bearing upon the subject, are yet, practically, among the most potent arguments against the interpretation of the Fourteenth amendment, which I consider the only one that its language fairly admits of.

It is said that women do not desire to vote. Certainly many women do not, but that furnishes no reason for denying the right to those who do desire to vote. Many men decline to vote. Is that a reason for denying the right to those who would vote?

I believe, however, that the public mind is greatly in error in regard to the proportion of female citizens who would vote if their right to do so were recognized. In England there has been to some extent a test of that question, with the following result, as given in the newspapers, the correctness of which, in this respect, I think there is no reason to doubt: "Woman suffrage is, to a certain extent, established in England, with the result as detailed in the London Examiner, that in sixty-six municipal elections, out of every thousand women who enjoy equal rights with men on the register, 516 went to the poll, which is but forty-eight less than the proportionate number of men. And out of 27,949 women registered, where a contest occurred, 14,416 voted. Of men there were 166,781 on the register, and 90,080 at the poll." The Examiner thereupon draws this conclusion: "Making allowance for the reluctance of old spinsters to change their habits, and the more frequent illness of the sex, it is manifest that women, if they had opportunity, would exercise the franchise as freely as men. There is an end, therefore, of the argument that women would not vote if they had the power." Our law books furnish, perhaps, more satisfactory evidence of the earnestness with which women in England are claiming the right to vote, under the reform act of 1867, aided by Lord Brougham's act of 1850.



The case of *Chorlton v. Lings*, came before the Court of Common Pleas in England in 1869. It was an appeal from the decision of the revising barrister, for the borough of Manchester, to the effect "that Mary Abbott, being a woman not entitled to be placed on the register." Her right was perfect in all respects excepting that of sex. The court, after a very full and able discussion of the subject, sustained the decision of the revising barrister, denying women the right to be placed on the register, and consequently denying their right to vote. The decision rested on the peculiar phraseology of several Acts of Parliament, the point decided has no applicability here. My object in referring to the case has been to call attention to the fact stated by the reporter, that appeals of 5,436 other women were consolidated and decided with this. No better evidence can be furnished of the extent and earnestness of the claim of women in England to exercise the elective franchise.<sup>13</sup>

I infer, without being able to say how the fact is, that the votes given by women, as mentioned in the newspaper, were given at municipal elections merely, and that the cases decided by the Court of Common Pleas relate to elections for members of Parliament.

Another objection is, that the right to hold office must attend the right to vote, and that women are not qualified to discharge the duties of responsible offices.

I beg leave to answer this objection by asking one or more questions. How many of the male bipeds who do our voting are qualified to hold high offices? How many of the large class to whom the right of voting is supposed to have been secured by the Fifteenth amendment, are qualified to hold office?

Whenever the qualifications of persons to discharge the duties of responsible offices is made the test of their right to vote, and we are to have a competitive examination on that subject open to all claimants, my client will be content to

<sup>13</sup> L. R. 4 C. P., 374.

enter the lists, and take her chances among the candidates for such honors.

But the practice of the world, and our own practice, give the lie to this objection. Compare the administration of female sovereigns of great kingdoms, from Semiramis to Victoria, with the average administration of male sovereigns, and which will suffer by the comparison? How often have mothers governed large kingdoms, as regents, during the minority of their sons, and governed them well? Such offices as the "sovereigns" who rule them in this country have allowed women to hold (they having no voice on the subject), they have discharged the duties of with ever increasing satisfaction to the public; and Congress has lately passed an act, making the official bonds of married women valid, so that they could be appointed to the office of postmaster.

The case of *Olive v. Ingram*<sup>14</sup> was an action brought to try the title to an office. On the death of the sexton of the parish of St. Butolph, the place was to be filled by election, the voters being the housekeepers who "paid Scot and lot" in the parish. The widow of the deceased sexton (Sarah Bly) entered the lists against Olive, the plaintiff in the suit, and received one hundred and sixty-nine indisputable votes, and forty votes given by women who were "housekeepers, and paid to church and poor." The plaintiff had one hundred and seventy-four indisputable votes, and twenty votes given by such women as voted for Mrs. Bly. Mrs. Bly was declared elected. The action was brought to test two questions: 1. Whether women were legal voters; and 2. Whether a woman was capable of holding the office. The case was four times argued in the King's Bench, and all the judges delivered opinions, holding that the women were competent voters; that the widow was properly elected, and could hold the office.

In the course of the discussion it was shown that women had held many offices, those of constable, church warden, overseer of the poor, keeper of the "gate house" (a public prison), governess of a house of correction, keeper of castles, sheriffs of counties, and high constable of England.

<sup>14</sup> 7 Modern Rep., 263.

If women are legally competent to hold minor offices, they would be glad to have the rule of law, or of propriety, which should exclude them from higher offices, and which marks the line between those which they may and those which they may not hold.

Another objection is that women cannot serve as soldiers. To this I answer that capacity for military service has not been made a test of the right to vote. If it were, young men from sixteen to twenty-one would be entitled to vote, old men from sixty and upwards would not. If that were the test, some women would present much stronger claims than many of the male sex.

Another objection is that engaging in political controversies is not consistent with the feminine character. Upon that subject, women themselves are the best judges, and if political duties should be found inconsistent with female delicacy, we may rest assured that women will either effect a change in the character of political contests, or decline to engage in them. This subject may be safely left to their sense of delicacy and propriety. If any difficulty on that account should occur, it may not be impossible to receive the votes of women at their places of residence. This method of voting was practiced in ancient Rome under the republic, and it will be remembered that when the votes of the soldiers who were fighting our battles in the Southern states were needed to sustain their friends at home, no difficulty was found in the way of taking their votes at their respective camps.

I humbly submit to your Honor, therefore, that on the constitutional grounds to which I have referred, Miss Anthony had a lawful right to vote; that her vote was properly received and counted; that the first section of the Fourteenth amendment secured to her that right, and did not need the aid of any further legislation.

But conceding that I may be in error in supposing that Miss Anthony had a right to vote, she has been guilty of no crime, if she voted in good faith believing that she had such

right. This proposition appears to me so obvious, that were it not for the severity to my client of the consequences which may follow a conviction, I should not deem it necessary to discuss it.

To make out the offense, it is incumbent on the prosecution to show affirmatively, not only that the defendant knowingly voted, but that she so voted knowing that she had no right to vote. That is, the term "knowingly" applies, not to the fact of voting, but to the fact of want of right. Any other interpretation of the language would be absurd. We cannot conceive of a case where a party could vote without knowledge of the fact of voting, and to apply the term "knowingly" to the mere act of voting, would make nonsense of the statute. This word was inserted as defining the essence of the offense, and it limits the criminality to cases where the voting is not only without right, but where it is done wilfully, with a knowledge that it is without right. Short of that there is no offense within the statute. This would be so upon well established principles, even if the word "knowingly" had been omitted, but that word was inserted to prevent the possibility of doubt on the subject, and to furnish security against the inability of stupid or prejudiced judges or jurors, to distinguish between wilful wrong and innocent mistake. If the statute had been merely, that "if at any election for representative in Congress any person shall vote without having a lawful right to vote, such person shall be deemed guilty of a crime," there could have been justly no conviction under it, without proof that the party voted knowing that he had not a right to vote. If he voted innocently supposing he had the right to vote, but had not, it would not be an offense within the statute. An innocent mistake is not a crime. and no amount of judicial decisions can make it such.<sup>15</sup>

I concede, that if Miss Anthony voted, knowing that as a

<sup>15</sup> Then Mr. Selden cited numerous legal authorities to show that wrongful intent was essential to crime. Bishop on Crim. Law; Hawkins Pleas of the Crown and others.

woman she had no right to vote, she may properly be convicted, and that if she had dressed herself in men's apparel and assumed a man's name, or resorted to any artifice to deceive the board of inspectors, the jury might properly regard her claim of right, to be merely colorable, and might in their judgment, pronounce her guilty of the offense charged in case the Constitution has not secured to her the right so claimed. All I claim is, that if she voted in perfect good faith, believing that it was her right, she has committed no crime. An innocent mistake, whether of law or fact, though a wrongful act may be done in pursuance of it, cannot constitute a crime.

There are some cases which I concede cannot be reconciled with the position which I have endeavored to maintain, and I am sorry to say that one of them is found in the report of this state. As the other cases are referred to in that, and the principle, if they can be said to stand on any principle is in all of them the same, it will only be incumbent on me to notice that one. That case is not only irreconcilable with the numerous authorities and the fundamental principles of criminal law to which I have referred, but the enormity of its injustice is sufficient alone to condemn it. I refer to the case of *Hamilton v. The People*.<sup>16</sup> In that case Hamilton had been convicted of a misdemeanor, in having voted at a general election, after having been previously convicted of a felony and sentenced to two years' imprisonment in the state prison, and not having been pardoned; the conviction having by law deprived him of citizenship and right to vote, unless pardoned and restored to citizenship. The case came up before the General Term of the Supreme Court, on writ of error. It appeared that on the trial evidence was offered, that before the prisoner was discharged from the state prison, he and his father applied to the Governor for a pardon, and that the Governor replied in writing, that on the ground of the prisoner's being a minor at the time of his discharge

<sup>16</sup> 57 Barb. 725.

from prison, a pardon would not be necessary, and that he would be entitled to all the rights of a citizen on his coming of age. They also applied to two respectable counsellors of the Supreme Court, and they confirmed the Governor's opinion. All this evidence was rejected. It appeared that the prisoner was seventeen years old when convicted of the felony, and was nineteen when discharged from prison. The rejection of the evidence was approved by the Supreme Court on the ground that the prisoner was bound to know the law, and was presumed to do so, and his conviction was accordingly confirmed.

Here a young man, innocent so far as his conduct in this case was involved, was condemned, for acting in good faith upon the advice, (mistaken advice it may be conceded,) of one governor and two lawyers to whom he applied for information as to his rights; and this condemnation has proceeded upon the assumed ground conceded to be false in fact, that he knew the advice given him was wrong. On this judicial fiction the young man, in the name of justice, is sent to prison, punished for a mere mistake, and a mistake made in pursuance of such advice. It cannot be, consistently with the radical principles of criminal law to which I have referred, and the numerous authorities which I have quoted, that this man was guilty of a crime, that his mistake was a crime, and I think the judges who pronounced his condemnation, upon their own principles, better than their victim, deserved the punishment which they inflicted.

The condemnation of Miss Anthony, her good faith being conceded, would do no less violence to any fair administration of justice.

One other matter will close what I have to say. Miss Anthony believed, and was advised that she had a right to vote. She may also have been advised, as was clearly the fact, that the question as to her right could not be brought before the courts for trial, without her voting or offering to vote, and if either was criminal, the one was as much so as the other. Therefore she stands now arraigned as a

criminal, for taking the only steps by which it was possible to bring the great constitutional question as to her right, before the tribunals of the country for adjudication. If for thus acting, in the most perfect good faith, with motives as pure and impulses as noble as any which can find place in your Honor's breast in the administration of justice, she is by the laws of her country to be condemned as a criminal, she must abide the consequences. Her condemnation, however, under such circumstances, would only add another most weighty reason to those which I have already advanced, to show that women need the aid of the ballot for their protection.

Upon the remaining question, of the good faith of the defendant, it is not necessary for me to speak. That she acted in the most perfect good faith stands conceded.

Thanking your Honor for the great patience with which you have listened to my too extended remarks, I submit the legal questions which the case involves for your Honor's consideration.

Mr. Justice HUNT. Gentlemen of the Jury: I have given this case such consideration as I have been able to, and, that there might be no misapprehension about my views, I have made a brief statement in writing.

The defendant is indicted under the Act of Congress of 1870, for having voted for Representatives in Congress in November, 1872. Among other things, that Act makes it an offense for any person knowingly to vote for such Representatives without having a right to vote. It is charged that the defendant thus voted, she not having a right to vote because she is a woman. The defendant insists that she has a right to vote; that the provisions of the Constitution of this state limiting the right to vote to persons of the male sex is in violation of the Fourteenth Amendment of the Constitution of the United States, and is void. The Thirteenth, Fourteenth and Fifteenth Amendments were designed mainly for the protection of the newly emancipated negroes, but full effect must nevertheless be given to the language em-

ployed. The Thirteenth Amendment provided that neither slavery nor involuntary servitude should longer exist in the United States. If honestly received and fairly applied, this provision would have been enough to guard the rights of the colored race. In some states it was attempted to be evaded by enactments cruel and oppressive in their nature, as that colored persons were forbidden to appear in the towns except in a menial capacity; that they should reside on and cultivate the soil without being allowed to own it; that they were not permitted to give testimony in cases where a white man was a party. They were excluded from performing particular kinds of business, profitable and reputable, and they were denied the right of suffrage. To meet the difficulties arising from this state of things, the Fourteenth and Fifteenth Amendments were enacted.

The Fourteenth Amendment created and defined citizenship of the United States. It had long been contended, and had been held by many learned authorities, and had never been judicially decided to the contrary, that there was no such thing as a citizen of the United States, except as that condition arose from citizenship of some state. No mode existed, it was said, of obtaining a citizenship of the United States except by first becoming a citizen of some state. This question is now at rest. The Fourteenth Amendment defines and declares who should be citizens of the United States, to wit: "All persons born or naturalized in the United States and subject to the jurisdiction thereof." The latter qualification was intended to exclude the children of foreign representatives and the like. With this qualification every person born in the United States or naturalized is declared to be a citizen of the United States, and of the state wherein he resides. After creating and defining citizenship of the United States, the Amendment provides that no state shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States. This clause is intended to be a protection, not to all our rights, but to our rights as citizens of the United States only; that is,



the rights existing or belonging to that condition or capacity. The words "or citizen of a state," used in the previous paragraph are carefully omitted here. In Article 4, paragraph 2, of the Constitution of the United States it had already provided in this language, viz: "the citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states." The rights of citizens of the states and of citizens of the United States are each guarded by these different provisions. That these rights were separate and distinct, was held in the Slaughter House Cases recently decided by the United States Supreme Court at Washington. The rights of citizens of the state, as such, are not under consideration in the Fourteenth Amendment. They stand as they did before the adoption of the Fourteenth Amendment, and are fully guaranteed by other provisions. The rights of citizens of the states have been the subject of judicial decision on more than one occasion.<sup>17</sup>

These are the fundamental privileges and immunities belonging of right to the citizens of all free governments, such as the right of life and liberty; the right to acquire and possess property, to transact business, to pursue happiness in his own manner, subject to such restraint as the Government may adjudge to be necessary for the general good. In *Cromwell v. Nevada*,<sup>18</sup> is found a statement of some of the rights of a citizen of the United States, viz: "To come to the seat of the Government to assert any claim he may have upon the Government, to transact any business he may have with it; to seek its protection; to share its offices; to engage in administering its functions. He has a right of free access to its seaports through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several states." Another privilege of a citizen of the United States, says Miller, Justice, in the Slaughter House cases, is to demand the care and pro-

<sup>17</sup> *Corfield v. Coryell*, 4 Wash., C. C., 371. *Ward v. Maryland*; 12 Wall., 430. *Paul v. Virginia*, 8 Wall., 140.

<sup>18</sup> 6 Wall. 36.

tection of the Federal Government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government. The right to assemble and petition for a redress of grievances, the privileges of the writ of *habeas corpus*, he says, are rights of the citizen guaranteed by the Federal Constitution.

The right of voting, or the privilege of voting, is a right or privilege arising under the Constitution of the state, and not of the United States. The qualifications are different in the different states. Citizenship, age, sex, residence, are variously required in the different states, or may be so. If the right belongs to any particular person, it is because such person is entitled to it by the laws of the state where he offers to exercise it, and not because of citizenship of the United States. If the state of New York should provide that no person should vote until he had reached the age of thirty-one years, or after he had reached the age of fifty, or that no person having gray hair, or who had not the use of all his limbs should be entitled to vote, I do not see how it could be held to be a violation of any right derived or held under the Constitution of the United States. We might say that such regulations were unjust, tyrannical, unfit for the regulation of an intelligent state; but if rights of a citizen are thereby violated, they are of that fundamental class derived from his position as a citizen of the state, and not those limited rights belonging to him as a citizen of the United States, and such was the decision in *Corfield v. Coryell*. The United States rights appertaining to this subject are those first under Article 1, paragraph 2, of the United States Constitution, which provides that electors of Representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the State Legislature, and second, under the Fifteenth Amendment, which provides that the right of a citizen of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude. If the Legislature of the state of New York should require

a higher qualification in a voter for a representative in Congress than is required for a voter for a Member of Assembly, this would, I conceive, be a violation of the right belonging to one as a citizen of the United States. That right is in relation to a Federal subject or interest, and is guaranteed by the Federal Constitution. The inability of a state to abridge the right of voting on account of race, color, or previous condition of servitude, arises from a Federal guaranty. Its violation would be the denial of a Federal right—that is a right belonging to the claimant as a citizen of the United States.

This right, however, exists by virtue of the Fifteenth Amendment. If the Fifteenth Amendment had contained the word “sex,” the argument of the defendant would have been potent. She would have said, an attempt by a state to deny the right to vote because one is of a particular sex, is expressly prohibited by that amendment. The amendment, however, does not contain that word. It is limited to race, color, or previous condition of servitude. The Legislature of the state of New York has seen fit to say, that the franchise of voting shall be limited to the male sex. In saying this, there is, in my judgment, no violation of the letter or of the spirit of the Fourteenth or of the Fifteenth Amendment. This view is assumed in the second section of the Fourteenth Amendment, which enacts that if the right to vote for Federal officers is denied by any state to any of the male inhabitants of such state, except for crime, the basis of representation of such state shall be reduced in proportion specified. Not only does this section assume that the right of male inhabitants to vote was the especial object of its protection, but it assumes and admits the right of a state, notwithstanding the existence of that clause under which the defendant claims to the contrary, to deny to classes or portions of the male inhabitants the right to vote which is allowed to other male inhabitants. The regulation of the suffrage is thereby conceded to the states as a state’s right. The case of *Myra Bradwell*, decided at a

recent term of the Supreme Court of the United States, sustains both the positions above put forth, viz: First, that the rights referred to in the Fourteenth Amendment are those belonging to a person as a citizen of the United States and not as a citizen of a state, and second, that a right of the character here involved is not one connected with citizenship of the United States. Mrs. Bradwell made application to be admitted to practice as an attorney and counselor at law, in the courts of Illinois. Her application was denied, and upon appeal to the Supreme Court of the United States, it was there held that to give jurisdiction under the Fourteenth Amendment, the claim must be of a right pertaining to citizenship of the United States, and that the claim made by her did not come within that class of cases. Mr. Justice Bradley and Mr. Justice Field held that a woman was not entitled to a license to practice law. It does not appear that the other judges passed upon that question.

The Fourteenth Amendment gives no right to a woman to vote, and the voting by Miss Anthony was in violation of the law.

If she believed she had a right to vote, and voted in reliance upon that belief, does that relieve her from the penalty? It is argued that the knowledge referred to in the act relates to her knowledge of the illegality of the act, and not to the act of voting; for it is said that she must know that she voted. Two principles apply here: First, ignorance of the law excuses no one; second, every person is presumed to understand and to intend the necessary effects of his own acts. Miss Anthony knew that she was a woman, and that the Constitution of this state prohibits her from voting. She intended to violate that provision—intended to test it, perhaps, but certainly intended to violate it. The necessary effect of her act was to violate it, and this she is presumed to have intended. There was no ignorance of any fact, but all the facts being known, she undertook to settle a principle in her own person. She takes the risk, and she cannot escape the consequences. It is said, and authorities are cited

to sustain the position, that there can be no crime unless there is a culpable intent; to render one criminally responsible a vicious will must be present. A commits a trespass on the land of B, and B, thinking and believing that he has a right to shoot an intruder on his premises, kills A on the spot. Does B's misapprehension of his rights justify his act? Would a judge be justified in charging the jury that if satisfied that B supposed he had a right to shoot A he was justified, and they should find a verdict of not guilty? No judge would make such a charge. To constitute a crime, it is true that there must be a criminal intent but it is equally true that knowledge of the facts of the case is always held to supply this intent. An intentional killing bears with it evidence of malice in law. Whoever, without justifiable cause, intentionally kills his neighbor, is guilty of a crime. The principle is the same in the case before us, and in all criminal cases. The precise question now before me has been several times decided, viz.: that one illegally voting was bound and was assumed to know the law and that a belief that he had a right to vote gave no defense, if there was no mistake of fact<sup>19</sup> No system of criminal jurisprudence can be sustained upon any other principle. Assuming that Miss Anthony believed she had a right to vote, that fact constitutes no defense if in truth she had not the right. She voluntarily gave a vote which was illegal, and thus is subject to the penalty of the law.

Upon this evidence I suppose there is no question for the jury and that the jury should be directed to find a verdict of guilty.

*Mr. Selden.* I submit that on the view which your Honor has taken, that the right to vote and the regulation of it is solely a state matter; that this whole law is out of the jurisdiction of the United States Courts and of Congress. The whole law upon that basis, as I understand it, is not within the constitutional power of the general government, but is

<sup>19</sup> *Hamilton v. People*, 57 Barb., 625; *State v. Boyet*, 10 Ired., 336; *State v. Hart*, 6 Jones, 389; *McGuire v. State*, 7 Humph., 54.

one which applies to the states. I suppose that it is for the jury to determine whether the defendant is guilty of a crime or not. And I therefore ask your Honor to submit to the jury these propositions: First—If the defendant, at the time of voting, believed that she had a right to vote and voted in good faith in that belief, she is not guilty of the offense charged. Second—In determining the question whether she did or did not believe that she had a right to vote, the jury may take into consideration, as bearing upon that question, the advice which she received from the counsel to whom she applied. Third—That they may also take into consideration, as bearing upon the same question, the fact that the inspectors considered the question and came to the conclusion that she had a right to vote. Fourth—That the jury have a right to find a general verdict of guilty or not guilty as they shall believe that she has or has not committed the offense described in the Statute.

A professional friend sitting by has made this suggestion which I take leave to avail myself of as bearing upon this question: The Court has listened for many hours to an argument in order to decide whether the defendant has a right to vote. The arguments show the same question has engaged the best minds of the country as an open question. Can it be possible that the defendant is to be convicted for acting upon such advice as she could obtain while the question is an open and undecided one?

**The COURT.** You have made a much better argument than that, sir.

**Mr. Selden.** As long as it is an open question I submit that she has not been guilty of an offense. At all events it is for the jury.

**The COURT.** I cannot charge these propositions of course. The question, gentlemen of the jury, in the form it finally takes, is wholly a question or questions of law, and I have decided as a question of law, in the first place, that under the Fourteenth Amendment, which Miss Anthony claims protects her, she was not protected in a right to vote. And

I have decided also that her belief and the advice which she took does not protect her in the act which she committed. If I am right in this, the result must be a verdict on your part of guilty, and I therefore direct that you find a verdict of guilty.

*Mr. Selden.* That is a direction no Court has power to make in a criminal case.

The COURT. Take the verdict, Mr. Clerk.

The Clerk. Gentlemen of the jury, hearken to your verdict as the Court has recorded it. You say you find the defendant guilty of the offense whereof she stands indicted, and so say you all?

*Mr. Selden.* I don't know whether an exception is available, but I certainly must except to the refusal of the Court to submit those propositions, and especially to the direction of the Court that the jury should find a verdict of guilty. I claim that it is a power that is not given to any Court in a criminal case. Will the Clerk poll the jury?

The COURT. No. Gentlemen of the jury, you are discharged.

June 18.

*Mr. Selden* today moved for a new trial on several grounds, the main one being that the Court had declined to submit the case to the jury upon any question whatever, and directed them to render a verdict of guilty against the defendant.

The COURT after hearing the *District Attorney*, denied the motion.

Mr. Justice HUNT. The prisoner will stand up. Has the prisoner anything to say why sentence shall not be pronounced?

*Miss Anthony.* Yes, your Honor, I have many things to say; for in your ordered verdict of guilty, you have trampled under foot every vital principle of our government. My natural rights, my civil rights, my political rights, my judicial rights, are all alike ignored. Robbed of the fundamental privilege of citizenship, I am degraded from the

status of a citizen to that of a subject; and not only myself individually, but all of my sex are, by your Honor's verdict, doomed to political subjection under this, so-called, form of government.

**Mr. Justice HUNT.** The Court cannot listen to a rehearsal of arguments the prisoner's counsel has already consumed three hours in presenting.

*Miss Anthony.* May it please your Honor, I am not arguing the question, but simply stating the reasons why sentence cannot in justice be pronounced against me. Your denial of my citizen's right to vote, is the denial of my right of consent as one of the governed, the denial of my right of representation as one of the taxed, the denial of my right to a trial by a jury of my peers as an offender against law, therefore the denial of my sacred rights to life, liberty, property and—

**Mr. Justice HUNT.** The Court cannot allow the prisoner to go on.

*Miss Anthony.* But your Honor will not deny me this one and only poor privilege of protest against this high-handed outrage upon my citizen's rights. May it please the Court to remember that since the day of my arrest last November, this is the first time that either myself or any person of my disfranchised class has been allowed a word of defense before judge or jury.

**Mr. Justice HUNT.** The prisoner must sit down—the Court cannot allow it.

*Miss Anthony.* All my prosecutors, from the Eighth ward corner grocery politician, who entered the complaint, to the United States Marshal, Commissioner, District Attorney, District Judge, your Honor on the bench, not one is my peer, but each and all are my political sovereigns; and had your Honor submitted my case to the jury, as was clearly your duty, even then I should have had just cause of protest, for not one of those men was my peer; but, native or foreign born, white or black, rich or poor, educated or ignorant, awake or asleep, sober or drunk, each and every man of



them was my political superior; hence, in no sense, my peer. Even, under such circumstances, a commoner of England, tried before a jury of Lords, would have far less cause to complain than should I, a woman, tried before a jury of men. Even my counsel, the Hon. Henry B. Selden, who has argued my cause so ably, so earnestly, so unanswerably before your Honor, is my political sovereign. Precisely as no disfranchised person is entitled to sit upon a jury, and no woman is entitled to the franchise, so, none but a regularly admitted lawyer is allowed to practice in the courts, and no woman can gain admission to the bar—hence, jury, judge, counsel, must all be of the superior class.

Mr. Justice HUNT. The Court must insist—the prisoner has been tried according to the established forms of law.

*Miss Anthony.* Yes, your Honor, but by forms of law all made by men, interpreted by men, administered by men, in favor of men, and against women; and hence, your Honor's ordered verdict of guilty, against a United States citizen for the exercise of that citizen's right to vote simply because that citizen was a woman and not a man. But, yesterday, the same man made forms of law, declared it a crime punishable with \$1,000 fine and six months' imprisonment, for you, or me, or any of us, to give a cup of cold water, a crust of bread, or a night's shelter to a panting fugitive as he was tracking his way to Canada. And every man or woman in whose veins coursed a drop of human sympathy violated that wicked law, reckless of consequences, and was justified in so doing. As then, the slaves who got their freedom must take it over, or under, or through the unjust forms of law, precisely so, now, must women, to get their right to a voice in this government, take it; and I have taken mine, and mean to take it at every possible opportunity.

Mr. Justice HUNT. The Court orders the prisoner to sit down. It will not allow another word.

*Miss Anthony.* When I was brought before your Honor for trial, I hoped for a broad and liberal interpretation of the Constitution and its recent amendments, that should de-

clare all United States citizens under its protecting ægis—that should declare equality of rights the national guaranty to all persons born or naturalized in the United States. But failing to get this justice—failing, even, to get a trial by a jury not of my peers—I ask not leniency at your hands—but rather the full rigors of the law.

Mr. Justice HUNT. The Court must insist—

(Here Miss Anthony sat down.)

Mr. Justice HUNT. The prisoner will stand up. (Here Miss Anthony arose again.) The sentence of the Court is that you pay a fine of one hundred dollars and the costs of the prosecution.

*Miss Anthony.* May it please your Honor, I shall never pay a dollar of your unjust penalty. All the stock in trade I possess is a \$10,000 debt, incurred by publishing my paper—*The Revolution*—four years ago, the sole object of which was to educate all women to do precisely as I have done, rebel against your man-made, unjust, unconstitutional forms of law, that tax, fine, imprison and hang women, while they deny them the right of representation in the government; and I shall work on with might and main to pay every dollar of that honest debt, but not a penny shall go to this unjust claim. And I shall earnestly and persistently continue to urge all women to the practical recognition of the old revolutionary maxim, that resistance to tyranny is obedience to God.

Mr. Justice HUNT. Madam, the Court will not order you committed until the fine is paid.

**THE TRIAL OF BEVERLY W. JONES, EDWIN P.  
MARSH AND WILLIAM B. HALL FOR PER-  
MITTING WOMEN TO VOTE, NEW YORK,  
1873.**

**THE NARRATIVE.**

On the same day that Miss Anthony was sentenced, the three inspectors of election, Jones, Marsh and Hall, were put on their trial for registering and receiving illegal votes. All of them were convicted, the Court holding, as it did in Miss Anthony's case, that good faith in receiving the votes of the women was no protection.

**THE TRIAL.<sup>1</sup>**

*In the United States Circuit Court for the Northern District  
of New York, Canandaigua, New York, June, 1873.*

HON. WARD HUNT,<sup>2</sup> *Judge.*

*June 18.*

The defendants had been, at the previous January term of this Court, indicted for misdemeanors in the office of Inspectors of Elections for one of the election districts of the city of Rochester.<sup>3</sup>

<sup>1</sup> *Bibliography*; see *ante*, p. 2.

<sup>2</sup> See *ante*, p. 2.

<sup>3</sup> In the first count, it was charged that they did in November 2, 1872, "knowingly and wilfully register as a voter of said district for the office of Member of Congress one Susan B. Anthony, she, said Susan B. Anthony then and there not being entitled to be registered as a voter of said district, in that she, said Susan B. Anthony, was then and there a person of the female sex, contrary to the form of the Statute of the United States of America."

On being arraigned to-day, Jones and Marsh pleaded *Not Guilty*; Hall did not appear or plead.

*Richard Crowley*,<sup>4</sup> District Attorney, for the United States.

*John Van Voorhis*,<sup>5</sup> for the Defendants.

The case being opened by *Mr. Crowley*, *Mr. Van Voorhis* raised some objection to the indictment, viz: that the Act of Congress under which it is framed, is invalid so far as it

The second count charged that they did on the same day "knowingly and wilfully register as voters of said district certain persons, to wit: Susan B. Anthony, Sarah Truesdale, Mary Pulver, Mary Anthony, Ellen S. Baker, Margaret Leyden, Anna L. Mosher, Nancy M. Chapman, Lottie B. Anthony, Susan B. Hough, Hannah Chatfield, Mary S. Hibbard, Rhoda DeGarmo, and Jane Cogswell, said persons there and then not being entitled to be registered as voters of said District, in that each of said persons was then and there a person of the female sex, contrary to the form of the statute of the United States of America."

The third count charged that they did on the fifth day of November, 1872, at an election for a Representative in Congress "knowingly and wilfully receive the votes of certain persons, not then and there entitled to vote, to-wit: Susan B. Anthony, Sarah Truesdale, Mary Pulver, Mary Anthony, Ellen S. Baker, Margaret Leyden, Hannah L. Mosher, Nancy M. Chapman, Susan M. Hough, Guelma S. McLean, Hannah Chatfield, Mary S. Hibbard, Rhoda DeGarmo, and Jane Cogswell, each of said persons being then and there a member of the female sex, and then and there not entitled to vote, as they, said Beverly W. Jones, Edwin T. Marsh and William B. Hall then and there well knew, contrary to the form of the Statute of the United States of America."

The fourth count charged that they did on the fifth day of November, 1872, at an election in Rochester for a Representative in Congress, knowingly and wilfully receive the votes of certain persons for said representative, said persons then and there being not entitled to vote for said Representatives in the Congress of the United States, viz: Susan B. Anthony, Susan M. Hough, Sarah Truesdale, Mary Pulver, Mary Anthony, Ellen S. Baker, Margaret Leyden, Hannah L. Mosher, Nancy M. Chapman, Lottie B. Anthony, Guelma L. McLean, Hannah Chatfield, Mary S. Hibbard, Rhoda DeGarmo and Jane Cogswell, each of said persons then and there being a person of the female sex, and then and there not entitled to vote for the Representatives in Congress, as they, said Beverly W. Jones, Edwin T. Marsh and William B. Hall, then and there well knew, contrary to the form of the Statute of the United States of America."

<sup>4</sup> See *ante*, p. 4.

<sup>5</sup> See *ante*, p. 4.

relates to this offense, because not authorized by the Constitution of the United States, and that there is no sufficient statement of any offense in the indictment. The Court overruled the objection.

#### THE WITNESSES FOR THE PROSECUTION.

**William F. Morrison.** Live in Rochester; was City Clerk in November 1872; have the registration and poll lists of the first Election District; know the defendants. The lists were left in my office by Beverly W. Jones, the Chairman of the Board of Inspectors, and they are signed and subscribed to by him and William B. Hall and Edwin T. Marsh. On November 5th, there was an election held in that District for Member of Congress. (The poll and registration lists were put in evidence.)

**Sylvester Lewis.** Live in Rochester; know the defendants; they acted as a board of registry in November last; Saw them registering votes. Saw the following women at the office: Susan B. Anthony, Sarah Truesdale, Mary Pulver, Mary Anthony, Ellen S. Baker, Margaret Leyden, Ann S. Mosher, Nancy M. Chapman, Lottie B. Anthony, Susan M. Hough, Hannah Chatfield, Mary S. Hibbard, Rhoda DeGarmo, and Jane Cogswell; knew most of them by sight. Saw Rhoda DeGarmo, Miss Mary Anthony, Sarah C. Truesdale, Susan M. Hough; think I saw Nancy M. Chatfield, Mrs. Margaret Leyden, and Mrs. M. E. Pulver; those I recollect; was better acquainted with those than with the others. The inspectors were there all the time. Sometimes all three, but always one or two.

On the day of the election, saw the following ladies vote: Susan B. Anthony, Mrs. McLean, Rhoda DeGarmo, Mary Anthony, Ellen S. Baker, Sarah C. Truesdale, Mrs. Hough, Mrs. Mosher, Mrs. Leyden, Mrs. Pulver; recollect seeing those ladies; in fact, think I saw the whole of them vote with the exception of two, but will not be positive on that point; think they voted four tickets; was not near enough to see the indorsement; but noticed which boxes they went into. The defendants were present, and acting as Inspectors of Election. All the ladies voted early in the morning.

**Cross-examined.** Made a list at the time of the women that voted; my business at the polls that day was checking parties that I supposed had a right to vote. Had canvassed the ward for some of the candidates. Mr. Jones took Miss Anthony's vote, but the other inspectors were present. Some of the votes were taken by the other inspectors. There were six ballot boxes, and six tickets voted. Understood that the women voted all the tickets except the Constitutional Amendments. Heard Jones say the ladies voted the Congressional ticket.

**Mr. Van Voorhis.** Did you say anything there about getting twenty women to vote?

*Mr. Crowley* objected.

*Mr. Van Voorhis.* I propose to show that this witness said to parties there that he would go and get twenty Irish women to vote to offset these votes.

The COURT sustained the objection.

*William F. Morrison* (recalled). On the registration list I find the following names: Susan B. Anthony, Sarah C. Truesdale, Mary Pulver, Mary Anthony, Ellen S. Baker, Margaret L. Leyden, Hannah L. Mosher, Nancy M. Chapman, Lottie B. Anthony, Susan M. Hough, Hannah Chatfield, Mary S. Hibbard, Jane Cogswell; do not find Rhoda DeGarmo. On the list of voters on election day I find the following: Susan B. Anthony, Sarah Truesdale, Mary Pulver, Mary Anthony, Mary S. Baker, Margaret Leyden, Hannah L. Mosher, Nancy M. Chapman, Lottie B. Anthony, Susan M. Hough, Hannah Chatfield, Mary S. Hibbard, Rhoda DeGarmo, and Jane Cogswell. The heading of the lists shows that these people voted certain tickets.

*Mr. Crowley.* Which tickets did they vote? After the name of Susan B. Anthony in the column of electors there is a small straight mark.

*Mr. Van Voorhis.* I object to any marks on the books, which the witness did not make, as any evidence that these persons voted for members of Congress.

The COURT. I think it is competent.

*Mr. Morrison.* Opposite each of the names that I have read, there are checks, showing that they voted Electoral, State, Con-

gressional, and Assembly Tickets—four tickets.

*Cross-examined.* All I know about these tickets or that book is what appears on the face of it. Don't know who made those straight marks or why they were made; would say that to each of these persons the preliminary oath was administered, and also the general oath.

*Margaret Leyden.* Reside in Rochester, in the Eighth Ward. Registered in November as a voter before Mr. Jones and the other inspectors. Voted on November 5th for candidates for Congress; Mr. Jones took my vote; the other inspectors were present.

*Cross-examined.* No one but my husband saw who I voted for; when I voted, the ballot was folded so no one could see it.

The COURT. What is the object of this?

*Mr. Van Voorhis.* The District Attorney inquired if she voted a certain ticket, and assumed to charge these inspectors with knowing what she voted. It is to show that the ticket being folded, the inspector could not see what was in it.

*Mr. Van Voorhis.* In voting, did you believe that you had a right to vote, and vote in good faith?

Objected to, and objection sustained by the COURT.

*Margaret Leyden.* Many of the ladies whose names have been mentioned to-day were present when I voted. I remember that the following voted: Miss Susan B. Anthony, Mrs. Pulver, Mrs. Mosher, Mrs. Lottie B. Anthony, the wife of Alderman Anthony, Miss Mary Anthony, Miss Baker and Mrs. Chapman.

## THE WITNESSES FOR THE DEFENSE.

*Beverly W. Jones.* Reside in Rochester; am 25 years of age; was an inspector of election for the eighth ward; elected by the people of the ward; was present at the Board of Registry when Miss Anthony and others appeared and demanded to be registered. Miss Anthony and two other ladies came into the room. Miss Anthony asked if this was the place where they registered the names of voters; I told her it was; she said she would like to have her name registered; I told her I didn't think we could register her name; it was contrary to the Constitution of the State of New York. She claimed her rights under the Constitution of the United States; under an amendment to the Constitution; she asked me if I was conversant with the fourteenth amendment; I told her I had read it and heard of it several times. William B. Hall and I were the only inspectors present at the time; Mr. Marsh was not there; Daniel J. Warner, the United States Supervisor (Republican); Silas J. Wagner, another United States Supervisor (Democrat) and a United States Marshal, were also there.

The COURT. Was your objection to registering Miss Anthony on the ground that she was a woman? I said it was contrary to the Constitution of the State of New York, and I didn't think we could register her, because she was a woman.

*Mr. Van Voorhis.* State what occurred then.

*Mr. Jones.* Mr. Warner said—

The COURT. I don't think that

is competent, what Warner said.

*Mr. Van Voorhis.* The District Attorney has gone into what occurred at that time, and I ask to be permitted to show all that occurred at the time of the registry; this offense was committed there; it is a part of the *res gesta*; all that occurred at the moment Miss Anthony presented herself and had her name put upon the registry.

The COURT. I don't think that is competent.

*Mr. Van Voorhis.* I ask to show what occurred at the time of the registry.

The COURT. I don't think it is competent to state what Warner or Wagner advised.

*Mr. Van Voorhis.* So that the question may appear squarely in the case I offer to show what was said and done at the time Miss Anthony and the other ladies registered, by the inspectors, and the federal Supervisors, Wagner and Warner, in their presence, in regard to that subject.

The COURT. I exclude it.

*Mr. Van Voorhis.* Does that excluded all conversations that occurred there with any persons?

The COURT. It excludes anything of that character on the subject of advising them. Your case is just as good without it as with it.

*Mr. Van Voorhis.* I didn't offer it in view of the advice, but to show precisely what the operation of the minds of these inspectors was at that time, and what the facts are.

The COURT. It is not competent.

*Mr. Jones.* I was present on



the day of election, and received the votes of these persons; there were six ballot boxes; I was Chairman of the Board; I stood at the window and received the votes, most of the time; these ballots received were folded, and none of the inspectors saw or knew the contents of any of the ballots.

*Mr. Crowley.* I submit it is entirely immaterial whether these inspectors saw the names upon the ballots.

*The COURT.* I have excluded that already. It is not competent. It is proved that they put in votes, and it is proved by one of the ladies that she did vote for a candidate for Congress.

*Mr. Van Voorhis.* I propose to show by the witness that he didn't know the contents of any ballot, and didn't see it.

*The COURT.* That will be assumed. He could not do it with any propriety.

*Mr. Jones.* Mr. Hall objected to receiving the votes of the women, though while I was out for a moment he took the vote of one lady and put it in the box. All three of the Inspectors had agreed to register the women, but when it came to receiving the votes, Hall objected, but he was overruled by myself and the other member. In receiving the ballots, I acted honestly in accordance with my sense of duty and my best judgment.

*Mr. Van Voorhis.* State whether or not challenges were entered against these voters prior to the day of election? There was.

*Mr. Van Voorhis.* On their presenting their votes, what was done? I told Miss Anthony,

when she offered her vote, that she was challenged; she would have to swear her ballot in if she insisted on voting; she said she insisted upon voting, and I presented her the Bible and administered to her the preliminary oath, which she took. I turned to the gentleman that challenged her and asked him if he still insisted on her taking the general oath. He said he did; I told her she would have to take the general oath; I administered the general oath, and she took it. That was done in the case of each woman who voted.

*To Mr. Crowley.* At first all three of the Inspectors were not agreed in registering the women. But before their names were put in the book, we were unanimous. When they voted, myself and Mr. Marsh were in favor of receiving the votes, and Hall was opposed. When I counted the votes at night, I compared the votes with the list, and we found it fell short several ballots.

*Edwin T. Marsh.* Am one of the defendants, and was an Inspector for the eighth Ward appointed by the Common Council. Am 33 years old. The evidence of Mr. Jones is substantially correct.

*Mr. Van Voorhis.* Registering and receiving these votes, you believed that the law required you to do it, and you acted conscientiously and honestly? Objected to.

*The COURT.* Put the question as you did to the other witness—whether in receiving these votes he acted honestly and according to the best of his judgment.

*Mr. Van Voorhis.* Answer that question, please.



*Mr. Marsh.* I most assuredly did.

*William C. Storrs.* Reside in Rochester. Have been United States Commissioner for fifteen years.

*Mr. Van Voorhis.* Was any application made to you, by any person, at any time, for a warrant against them for this offense? Objected to.

*Mr. Van Voorhis.* If the counsel objects, I will not insist upon the evidence.

*Susan B. Anthony.* I would like to know if the testimony of a person who has been convicted of a crime, can be taken?

The COURT. They call you as a witness, madam.

*Mr. Van Voorhis.* Miss Anthony, I want you to state what occurred at the Board of Registry, when your name was registered? That would be very tedious, for it was full an hour.

*Mr. Van Voorhis.* State generally what was done, or what occupied that hour's time? Well the question of our right to be registered was a subject of discussion there, between the supervisors, inspectors and myself.

*Mr. Van Voorhis.* What occurred when you presented yourself at the polls on election day?

*Mr. Crowley.* I submit to the court that unless the counsel expects to change the version given by the other witnesses, it is not necessary to take up time.

The COURT. As a matter of discretion, I don't see how it will be of any benefit. It was fully related by the others, and doubtless correctly.

*Mr. Crowley.* It is not disputed.

*Miss Anthony.* I would like to say, if I might be allowed by the Court, that the general im-

pression that I swore I was a male citizen, is an erroneous one.

*Mr. Van Voorhis.* You took the two oaths there, did you? Yes, sir.

The COURT. You presented yourself as a female, claiming that you had a right to vote? I presented myself not as a female at all, sir; I presented myself as a citizen of the United States. I was called to the United States ballot box by the fourteenth amendment, not as a female, but as a citizen, and I went there.

*Mr. Van Voorhis.* We have a number of witnesses to prove what occurred at the time of registry, and what advice was given by these federal supervisors, but under your Honor's ruling it is not necessary for us to call them. Inasmuch as Mr. Hall is absent, I ask permission to put in his evidence as he gave it before the Commissioners.

*Mr. Crowley.* I have not read it, but I am willing they should use so much of it as is competent under your Honor's ruling.

The COURT. Will it change the case at all, Mr. Van Voorhis?

*Mr. Van Voorhis.* It only varies it a little as to Hall. He stated that he depended in consenting to the registry, upon the advice of Mr. Warner, who was his friend, and upon whom he looked as a political father.

The COURT. I think you have everything that any evidence could give you in the case. These men have sworn that they acted honestly, and in accordance with their best judgment. Now, if that is a defense, you have it, and it will not make it any stronger to multiply evidence.

*Mr. Van Voorhis.* I suppose

it will be conceded that Hall stands in the same position as to his motives?

*Mr. Crowley.* Yes; we have no evidence to offer upon that question at all.

*Mr. Van Voorhis.* May it please the Court, I submit that there is no ground whatever to charge these defendants with any criminal offense. 1. Because the women who voted were legal voters. 2. Because they were challenged and took the oaths which the Statute requires of Electors, and the Inspectors had no right, after such oath, to reject their votes. Construing the Statute under which this indictment is found the Court of Appeals of the State in *People v. Pease*<sup>6</sup> held that Inspectors of Election have no authority by statute to reject a vote except in three cases: (1) after a refusal to take the preliminary oath, or (2) fully to answer any questions put, or (3) on refusal to take general oath. Davies J., in his opinion after an examination of the provisions of the Statute says: "It is seen, therefore, that the inspectors have no authority, by statute, to reject a vote except in the three cases: after refusal to take preliminary oath, or fully to answer any questions put, or on refusal to take the general oath. And the only judicial discretion vested in them is, to determine whether any question put to the person offering to vote, has or has not, been fully answered. If the questions put have been fully answered, and such answers discover the fact, that the person offering to vote is not a qualified voter, yet if he persists in his claim to vote it is imperative upon the inspectors to administer to him the general oath, and if taken, to receive the vote and deposit the same in the ballot box." And Selden J., who wrote in the same case, examines this question with great care and reaches the same conclusion. These views were concurred in by all the judges. Denio J., who wrote a dissenting opinion in the case, concurred with the other judges as to the powers and duties of inspectors. The defendants, then, have not in the least violated any law of the state of New York. They performed their duty according to the statute and in accordance with

<sup>6</sup> 27 N. Y., 45.

the decision of the highest court of the state, and in accordance with the printed instructions furnished them by the Secretary of State. What further can be demanded of them? No United States statute prescribes or attempts to prescribe their duties. They cannot legally be convicted and should be discharged.

2. Because no malice is shown. Whether the women were entitled to have their names registered and to vote or not, the defendants believed they had such right, and acted in good faith, according to their best judgment, in allowing the registry of their names—and in receiving their votes—and whether they decided right or wrong in point of law, they were not guilty of any criminal offense.

The substance of the statute is, as to registration: "If any such officer shall knowingly and wilfully register as a voter any person not entitled to be registered, or refuse to register any person entitled to be registered . . . every such person shall be deemed guilty of a crime." And as to voting: "If any person shall . . . knowingly and wilfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any person entitled to vote . . . every such person shall be deemed guilty of a crime." To bring an inspector within either of these sections he must know as a matter of fact, that the person offering to vote, or to be registered, is not entitled to be registered or to vote.

The inspectors were compelled to decide the question, and to decide it instantly, with no chance for examination or even consultation—and if they decided in good faith, according to the best of their ability, they are excused, whether they decided correctly or not in point of law.

This is too well settled to admit of dispute—settled by authority as well as by the plainest principles of justice and common sense. The law never yet placed a public officer in a position where he would be compelled to decide a doubtful legal question, and to act upon his decision, subject to the penalty of fine or imprisonment if he chanced to err in his decision. All that is ever required of an officer, so placed,

whether a judicial or ministerial officer, so far as is necessary to escape any imputation of crime, is good faith. Ministerial officers may be required, in some cases, to act at their peril as to civil responsibilities, but as to criminal responsibilities never. Inspectors of elections, however, acting in good faith, incur neither civil nor criminal responsibilities.<sup>7</sup>

Besides when the statute speaks of "knowledge," aside from the expression "wilfully" it means knowledge as a fact—not any forced presumption of knowledge against the clear facts of the case.

To this extent and to this extent only, does the presumption that defendants were bound to know the law go, viz: They were bound to know that if they as a fact "knowingly and wilfully registered as a voter any person not entitled to be registered" or "knowingly and wilfully received the vote of any person not entitled to vote," in either case they were liable to the penalty; and they could not be allowed to urge in their defense any ignorance that the law made those facts criminal. Here is a total absence of any pretense of malice. The defendants acted honestly and according to their best judgment. This is conceded. The most that can be said against them is, that they have erred in judgment. They are not lawyers, nor skilled in the law. They had presented to them a legal question which, to say the least, has puzzled some of the ablest legal minds of the nation. The penalty is the same, on which ever side they err. If they can be convicted of crime, a test must be imposed upon them, which no judge in the land could stand.

The defendants should be discharged by the Court.

*Mr. Crowley* rose—

The COURT. I don't think it is necessary for you to spend time in argument, Mr. Crowley. I think upon the last authority cited by the counsel there is no defense in this case. It

<sup>7</sup> *Mr. Van Voorhis* cited *Jenkins v. Waldron*, 11 Johns, 114; *Goetchens v. Matthewson*, 5 Lans. 214; *Harman v. Tappenden*, 1 East, 555; *Barnardiston v. Some*, 2 Lev., 114; *Groenvelt v. Burwell*, 1 Salk., 396.

is entirely clear that where there is a distinct judicial act, the party performing the judicial act is not responsible, civilly or criminally, unless corruption is proven, and in many cases not when corruption is proven. But where the act is not judicial in its character—where there is no discretion—then there is no legal protection. That is the law, as laid down in the authority last quoted, and the authority quoted by Judge Selden in his opinion. It is undoubtedly good law. They hold expressly in that case that the inspectors are administrative officers, and not judicial officers.

Now, this is the point in the case, in my view of it: If there was any case in which a female was entitled to vote, then it would be a subject of examination. If a female over the age of twenty-one was entitled to vote, then it would be within the judicial authority of the inspectors to examine and determine whether in the given case the female came within that provision. If a married woman was entitled to vote, or if a married woman was not entitled to vote, and a single woman was entitled to vote, I think the inspectors would have a right in a case before them, to judge upon the evidence whether the person before them was married or single. If they decided erroneously, their judicial character would protect them. But under the law of this state, as it stands, under no circumstances is a woman entitled to vote. When Miss Anthony, Mrs. Leyden and the other ladies came there and presented themselves for registry, and presented themselves to offer their votes, when it appeared that they were women—that they were of the female sex—the power and authority of the inspectors was at an end. When they act upon a subject upon which they have no discretion, I think there is no judicial authority. There is a large range of discretion in regard to the votes offered by the male sex. If a man offers his vote, there is a question whether he is a minor—whether he is twenty-one years of age. The subject is within their jurisdiction. If they decide correctly, it is well; if they decide erroneously, they act judicially, and are not liable. If the question is whether the person presenting

his vote is a foreigner or naturalized, or whether he has been a resident of the state or district for a sufficient length of time, the subject is all within their jurisdiction, and they have a right to decide, and are protected if they decide wrong.

But upon the view which has been taken of this question of the right of females to vote, by the United States Court at Washington, and by the adjudication which was made this morning, upon this subject there is no discretion, and therefore I must hold that it affords no protection. In that view of the case, is there anything to go to the jury?

*Mr. Van Voorhis.* Yes, your Honor.

The COURT. What?

*Mr. Van Voorhis.* The jury must pass upon the whole case, and particularly as to whether any ballots were received for representative in Congress, or candidates for representative in Congress, and whether the defendants acted wilfully and maliciously.

The COURT. It is too plain to argue that.

*Mr. Van Voorhis.* There is nothing but circumstantial evidence.

The COURT. Your own witness testified to it.

*Mr. Van Voorhis.* But "knowingly," your Honor, implies knowing that it is a vote for representative in Congress.

The COURT. That comes within the decision of the question of law. I don't see that there is anything to go to the jury.

*Mr. Van Voorhis.* I cannot take your Honor's view of the case, but of course must submit to it. We ask to go to the jury upon this whole case, and claim that in this case, as in all criminal cases, the right of trial by jury is made inviolate by the Constitution—that the Court has no power to take it from the jury.

The COURT. I am going to submit it to the jury.

Gentlemen of the Jury: This case is now before you upon the evidence as it stands, and I shall leave the case with you to decide—

*Mr. Van Voorhis.* I claim the right to address the jury.

The COURT. I don't think there is anything upon which you can legitimately address the jury. Gentlemen, the defendants are charged with knowingly, wilfully and wrongfully receiving the votes of the ladies whose names are mentioned, in November last, in the city of Rochester. They are charged in the same indictment with wilfully and improperly registering those ladies. I decided in the case this morning, which many of you heard, probably, that under the law as it stands the ladies who offered their votes had no right to vote whatever. I repeat that decision, and I charge you that they had not a right to offer their votes. They having no right to offer their votes, the inspectors of election ought not to receive them. The additional question exists in this case whether the fact that they acted as inspectors will relieve them from the charge in this case. You have heard the views which I have given upon that. I think they are administrative officers. I charge you that they are administrative and ministerial officers in this respect, that they are not judicial officers whose action protects them, and that therefore they are liable in this case. But instead of doing as I did in the case this morning—directing a verdict—I submit the case to you with these instructions, and you can decide it here, or you may go out.

*Mr. Van Voorhis.* I ask your Honor to instruct the jury that if they find these inspectors acted honestly, in accordance with their best judgment, they should be acquitted.

The COURT. I have expressly ruled to the contrary of that, gentlemen; that that makes no difference.

*Mr. Van Voorhis.* And that in this country—under the laws of this country—

The COURT. That is enough—you need not argue it, Mr. Van Voorhis.

*Mr. Van Voorhis.* Then I ask your Honor to charge the jury that they must find the fact that these inspectors received the votes of these persons knowingly, and that such votes were votes for some person for member of Congress,

there being in the case no evidence that any man was voted for, for member of Congress, and there being no evidence except that secret ballots were received; that the jury have a right to find for the defendants, if they choose.

The COURT. I charge the jury that there is sufficient evidence to sustain the indictment, upon this point.

Mr. Van Voorhis. I ask your Honor also to charge the jury that there is sufficient evidence to sustain a verdict of not guilty.

The COURT. I cannot charge that.

Mr. Van Voorhis. Then why should it go to the jury?

The COURT. As a matter of form.

Mr. Van Voorhis. If the jury should find a verdict of not guilty, could your Honor set it aside?

The COURT. I will debate that with you when the occasion arises. Gentlemen, you may deliberate here, or retire, as you choose.

The *Jury* retired for consultation, and the COURT took a recess until seven p. m.

The COURT re-convened at seven o'clock, when the clerk called the *Jury*, and asked them if they had agreed upon their verdict. The foreman replied in the negative.

The COURT. Is there anything upon which I can give you any advice, gentlemen, or any information?

A *Juror*. We stand eleven for conviction, and one opposed.

The COURT. If that gentleman desires to ask any questions in respect to the questions of law, or the facts in the case, I will give him any information he desires. (No response from the jury.) It is quite proper, if any gentleman has any doubt about anything, either as to the law or the facts, that he should state it to the Court. Counsel are both present, and I can give such information as is correct.

A *Juror*. I don't wish to ask any questions.

The COURT. Then you may retire again, gentlemen. The Court will adjourn until tomorrow morning.



The *Jury* retired, and after an absence of about ten minutes returned into court.

The *Clerk*. Gentlemen, have you agreed upon your verdict?

The *Foreman*. We have.

The *Clerk*. How say you, do you find the prisoners at the bar guilty of the offense whereof they stand indicted, or not guilty?

The *Foreman*. Guilty.

The *Clerk*. Hearken to your verdict as it stands recorded by the Court. You say you find the prisoners at the bar guilty of the offense whereof they stand indicted, and so say you all.

*Mr. Van Voorhis*. I ask that the jury be polled.

The *Clerk* polled the jury, each juror answering in the affirmative to the question, "Is this your verdict?"

*June 19.*

A motion for a new trial having been made and overruled, the COURT asked the defendants if they had anything to say why sentence should not be pronounced.

*Beverly W. Jones*. Your Honor has pronounced me guilty of crime; the jury had but little to do with it. In the performance of my duties as an inspector of election, which position I have held for the last four years, I acted conscientiously, faithfully and according to the best of my judgment and ability. I did not believe that I had a right to reject the ballot of a citizen who offered to vote, and who took the preliminary and general oaths; and answered all questions prescribed by the law. The instructions furnished me by the state authorities declared that I had no such right. As far as the registry of the names is concerned, they would never have been placed upon the registry, if it had not been for Daniel Warner, the Democratic federal Supervisor of elections, appointed by this Court, who not only advised the registry, but addressed us, saying, "Young men, do you know the penalty of the law if you refuse to register these names?" And after discharging my duties faithfully and honestly and to the best of my ability, if it is to vindicate

the law that I am to be imprisoned, I willingly submit to the penalty.

*Edwin T. Marsh.* In October last, just previous to the time fixed for the sitting of the Board of Registrars in the first district of the eighth ward of Rochester, a vacancy occurred. I was solicited to act, and consenting, was duly appointed by the Common council.

I had never given the matter a thought until called to the position, and as a consequence knew nothing of the law. On the morning of the first day of the last session of the board, Miss Anthony and other women presented themselves and claimed the right to be registered. So far as I knew, the question of woman suffrage had never come up in that shape before. We were in a position where we could take no middle course. Decide which way we might, we were liable to prosecution. We devoted all the time to acquiring information on the subject, that our duties as registrars would allow. We were expected, it seems, to make an infallible decision, inside of two days, of a question in regard to which some of the best minds of the country are divided. The influences by which we were surrounded, were nearly all in unison with the course we took. I believed then, and believe now, that we acted lawfully. I faithfully discharged the duties of my office, according to the best of my ability, in strict compliance with the oath administered to me. I consider the argument of our counsel unanswered and unanswerable. The verdict is not the verdict of the jury. I am Not Guilty of the charge.

The COURT sentenced the defendants to pay a fine of \$25 each, and the costs of the prosecution.

## **THE TRIAL OF MATTHEWS F. WARD FOR THE MURDER OF WILLIAM H. G. BUTLER, ELIZABETHTOWN, KENTUCKY, 1854.**

### **THE NARRATIVE.**

William Ward, a boy of fifteen and a pupil in the Louisville High School, returned home one evening and informed his elder brother, Matthews, who was twenty-four years of age and married, but living at his father's house, that he had been severely and unjustly whipped by Mr. Butler, the Principal. "Although I could have borne that, I cannot bear to be called a liar before the whole school," he added. The parents were away from home, but next morning, the second of November, 1853, they returned, and after the father had heard the story, and consented to his going, Matthews set out to the school to demand an explanation, accompanied by William and another brother, Robert.

Matthews was armed with a loaded revolver, and Robert carried a bowie knife, as was his custom. Arrived at the school, they went into a room filled with boys and inquired for Professor Butler. One of the boys went for him. When he came in, Matthews bade him good morning and said, "I have called around, Mr. Butler, to have a little conversation with you." Butler replied: "Walk into my private room." Matthews declined, saying: "No, the matter about which I wish to speak with you occurred here, and this is the proper place to speak of it. Mr. Butler, what are your ideas of justice; which do you think the worse, the little boy who begs chestnuts and scatters the hulls on the floor, or my brother, William, who gives them to him?" Butler replied, "I will not be interrogated, sir;" Matthews continued: "I have asked a civil question and have a right to a civil an-

swer—which is the worse, the contemptible little puppy who begs chestnuts and then lies about it, or my brother, William, who gave them to him?” Butler answered: “There is no such boy here.” “Then,” said Matthews, “that matter is settled—I have another question to ask. You called my brother a liar and I must have an apology.” “I have no apology to make.” “Is your mind fully made up about that?” “It is: I have no apology whatever to make.” “Then,” said Matthews, “you must hear my opinion of you. You are a damned scoundrel and a coward.”

What occurred then and for the next few minutes is not very clear. Several of the boys who were in the room testified that Matthews struck Butler, whereupon the latter took hold of him, and then Matthews drew his pistol and shot Butler, and that the latter did not strike Matthews first,<sup>1</sup> and this was the dying statement of Professor Butler.<sup>2</sup> But Robert Ward testified that at the word “coward” Butler struck Matthews and pushed him against the door and to the ground,<sup>3</sup> and an individual named Barlow appeared as a witness for the defense and told a story of being present at the Harney house and of his having heard Butler state the same thing.<sup>4</sup> But his story was thoroughly discredited and shown to be false.<sup>5</sup>

The affray caused great excitement among the boys in the room, most of whom, in a panic, jumped out of the windows, accompanied by the Second Master, who seemed as frightened as they were.<sup>6</sup> Butler fell to the ground on being shot, exclaiming, “I am killed, may God forgive me—my poor wife and child.” A number of the pupils carried him to the house of Colonel Harney, near by, where he died at midnight.

The Ward family was very prominent in Louisville and the tragedy caused so much discussion in that city that the

<sup>1</sup> Knight, p. 77; Pope, p. 82; Campbell, p. 83; Crawford, p. 85.

<sup>2</sup> Dr. Thomson, p. 89.

<sup>3</sup> Robert Ward, Jr., p. 103.

<sup>4</sup> Barlow, p. 92.

<sup>5</sup> Dr. Thomson, p. 89.

<sup>6</sup> Knight, p. 77.

venue was removed to Elizabethtown, where the hearing began on the eighteenth of April, 1854. Both Matthews and Robert had been indicted by the Grand Jury, but the former only was put on trial. He was represented by no less than nine lawyers, among them John J. Crittenden, at that time a great figure in national politics; John J. Helm, Governor of Kentucky, and Thomas F. Marshall—the “Tom Marshall of the Silver Tongue” and the foremost orator of the state. The plea was self-defense. The whole controversy centered on the question, Did Butler strike Matthews first? For it seemed to be taken for granted that a blow must be resented by a gentleman with a shot or a stab; and from the evidence of several of the witnesses, it would appear that in those days every man in Kentucky went armed.<sup>7</sup>

The Jury were evidently persuaded by the eloquence of the prisoner’s counsel, that the story of Robert Ward was true, and after a trial lasting fourteen days they returned a verdict of “not guilty.”

#### THE TRIAL.<sup>8</sup>

*In the Circuit Court of Hardin County, Elizabethtown, Kentucky, April, 1854.*

HON. J. W. KINCHELOE, *Judge.*

*April 18.*

The indictment, brought by change of venue, from Jeffer-

<sup>7</sup> Prentice, p. 92; Dr. Thomson, p. 89; R. J. Ward, p. 103; and see Trial of Judge Wilkinson, 1 Am. St. Tr. 132.

<sup>8</sup> *Bibliography.* \**“Full and authentic report of the testimony on the trial of Matt. F. Ward, certified to be correct by Thomas D. Brown, Clerk of Hardin Circuit Court, Wm. Alexander, former commonwealth attorney for the Hardin district, and Judge Alex. Walker, of New Orleans, with the speeches of Gov. Crittenden, Gov. Helm, T. F. Marshall, Esq., and Nathaniel Wolfe, Esq., and the reply of Alfred Allen, Esq., attorney for the commonwealth. Reported by A. D. Richardson. New York, D. Appleton & Company, 346 and 348 Broadway. 1854.”*

\**“Trial of Matt. F. Ward for the murder of Prof. W. H. G. Butler, before the Hardin Criminal Court, April term, 1854. Re-*

son County,<sup>9</sup> charged Matthews F. Ward with murder in the first degree, committed on William H. G. Butler, on the second of November, 1853, by shooting him with a pistol, the ball of which took effect in his left breast, and caused his death on the third of November. Robert J. Ward, Jr., was charged with aiding and abetting, in the second count, and as a principal, in the first count of the indictment.

*Alfred Allen*,<sup>10</sup> Commonwealth Attorney, *Sylvester Harris*,<sup>11</sup> *T. W. Gibson*, and *R. B. Carpenter*, for the State.

*John J. Crittenden*,<sup>12</sup> *Thomas F. Marshall*,<sup>13</sup> *John L.*

ported for the Louisville Courier and Louisville Democrat by George Cole, Louisville. Martin and Griswold, Sterotypers and printers, 1854." The two reports seem to represent the different sides of the controversy. Though the Richardson is probably a correct one as far as it goes, yet it gives the speeches of the counsel for the defense with great fulness, while it omits all the speeches for the prosecution, except that of Mr. Allen, p. 284. The Cole report on the other hand omits the speech of Governor Helm, p. 147, and Mr. Harris' speech is not reported by either.

<sup>9</sup> On December 15, 1853, a motion was made before Judge Bullock, of the Jefferson Circuit Court, by the counsel of Matt. F. and Robert J. Ward, Jr., for a change of venue. This motion was heard on the 19th, at which time affidavits were introduced to show that the excitement against the prisoners in Louisville, and Jefferson county, was such as would be likely to prevent a fair and impartial trial. The attorney for the Commonwealth (*E. S. Craig*) resisted the motion, but the Judge decided that the change asked for should be granted; and as affidavits by citizens of Oldham and Shelby counties were introduced by defendant's counsel to show that a fair and impartial trial could not be had in either of them, Judge Bullock decided that the case should go to Hardin. In accordance with this decision, the prisoners were removed to Elizabethtown on the first of February, and committed to the jail in that town.

<sup>10</sup> ALLEN, Alfred. Representative (Breckinridge County) Kentucky Legislature 1838-1839. Commonwealth attorney 1840-1856. Whig candidate for Lieutenant Governor 1859. Re-elected to Legislature 1861, and continued in that capacity until 1866. State Treasurer 1867. Consul at Foochoo, China, 1867.

<sup>11</sup> HARRIS, Sylvester. Member Kentucky Senate 1853-1857.

<sup>12</sup> CRITTENDEN, John J. (1787-1863.) Born in Kentucky. Graduated William and Mary College, 1807. Attorney General of Illinois 1809. United States Senator (Ky.) 1817-1819. 1835-1841. 1842-1848. 1855-1861. United States District Attorney 1827-1829. Attorney General United States 1835, 1850. Governor of Kentucky 1848.

<sup>13</sup> MARSHALL, Thomas Francis. (1801-1864.) Born Frankfort, Ky. Nephew of Chief Justice Marshall. Member of Kentucky Leg-

*Helm*,<sup>14</sup> *George A. Caldwell*,<sup>15</sup> *Nathaniel Wolfe*,<sup>16</sup> *Thomas W. Riley*,<sup>17</sup> *Charles G. Wintersmith*,<sup>18</sup> *James W. Hayes*, and *R. B. Hayes*, for the Defense.

The COURT made an order prohibiting the reporters, who were furnished with seats by the Court, from publication of testimony during the progress of the case, deeming such publication prejudicial to the interests of justice, and likely to interfere with a fair and impartial trial.

The *Counsel* on both sides who were not members of the Hardin County Bar, appeared and were duly qualified by taking the prescribed oath.

At nine o'clock the prisoners were brought into the court room, accompanied by their friends. The elder—Matt. F. Ward—was in a very feeble and reduced condition, induced by a severe attack of neuralgia, from which he had been suffering for several months. He was unable to walk without the assistance of crutches.

The *Counsel* both for the Commonwealth and the Defense expressed themselves in readiness to proceed to trial.

islature 1832-1851. Member of United States Congress 1841-1843. A contemporary writer calls him "the foremost Kentuckian orator of his time and for that matter any time, since his time, including the first orators Kentucky has produced." He was popularly known as "Tom Marshall of the Silver Tongue."

<sup>14</sup> HELM, John L. (1802-1867.) Born Kentucky. Practised law. Member State Legislature 1826-1837. Speaker 1835. State Senator 1844-1848. Governor of Kentucky 1850, 1867.

<sup>15</sup> CALDWELL, George A. Born in Kentucky. Representative in Congress 1843-1845 and 1845-1851. Died 1866.

<sup>16</sup> WOLFE, Nathaniel. (1810-1865.) Born Richmond, Va. Graduated University of Virginia. Practiced law in Kentucky 1839-1852. Commonwealth Attorney 1852. State Senator 1853-1855. Member Legislature (Louisville) 1859-1863. Member Union Constitutional Convention 1861. "Achieved great pecuniary success at the bar and a high reputation as a lawyer and pleader, being regarded as one of the most able and eloquent lawyers in the United States."

<sup>17</sup> RILEY, Thomas W. Member Louisville Bar. Mayor Louisville 1859. Representative State Legislature 1835-1849. Speaker 1849. Presidential elector 1841. Died 1872.

<sup>18</sup> WINTERSMITH, Charles G. Member House of Representatives 1838-1847, and 1851-1855. Speaker of Kentucky House 1854. Presidential elector 1841.

*Mr. Helm* moved that the prisoners be tried separately.

The COURT granted a severance, but left to the Commonwealth Attorney the privilege of deciding which of the prisoners should first go to trial.

*Mr. Allen* decided that Matthews F. Ward, as the principal in the case, should be tried first.

The *Prisoner* entered a plea of *Not Guilty*.

The empanelling of the jury was commenced. A majority of those called had formed and expressed an opinion on the case, from public rumor and newspaper reports, and were therefore incompetent to try it. When the regular panel was exhausted, therefore, only five jurors had been selected; and the Sheriff was directed to bring in bystanders until the full complement should be procured. The jury was at last declared full, after fifty-one had been excused from serving, being incapacitated by the cause alluded to above.

There was but one peremptory challenge made by the counsel for the defense. The others were excluded by the COURT as disqualified or having formed an opinion. It consisted of the following gentlemen, who were duly empanelled and sworn: Greene Walker, Thomas M. Yates, James Crutcher, George Stump, Raleigh McIntire, John Young, Thomas Thurston, Isaac C. Chenoweth, Asa Buckles, William Eidson, Abraham Neighbors, Richard Pierce.

The indictment was read to the jury by the *Clerk*.

JUDGE KINCHELOE. Gentlemen: The defendant in this case has been arraigned and has entered a plea of Not Guilty, throwing himself upon God and his country for trial. You are to try him, according to your oaths, upon this indictment. If you find him Guilty, you will say so: if Not Guilty, you will thus return him to the Court. In case the killing shall be proved to have been done by the defendant, under the influence of excitement and passion, you may find him guilty of manslaughter, under this indictment, and will do so. Should it appear that the killing was done in self-defense, it was not an act of voluntary manslaughter, and you will find him Not Guilty.



temptible puppy who begged chestnuts and then told a lie about it, or his brother William; Mr. Butler asked him to step into his study, but he refused again, and said if he could not answer there he did not want an answer; he then asked him why he called his brother William a liar; I then heard Matt. call Butler a d—d liar and a d—d scoundrel; Matt. appeared to be very much excited; saw that they drew nearer together, and Butler approached Ward; do not think Butler struck him but I observed a moment after that Butler had his hand on Matt's shoulder; Matt. drew his right hand from his pocket, while he and Butler were clinched, and drew out a pistol with it; he presented it immediately to Butler's left lung, and fired; Butler dropped immediately; Matt. then drew another pistol, and Robert drew a knife which he flourished about, and when Mr. Sturgus, one of the other teachers, came in, Robert said to him, "Come on," and approached him; Mr. Sturgus retired to his own room, but came out a moment after, when Robert chased him with the knife back into his room, and Sturgus made his absence out of the window; one or two of the other scholars and myself assisted Butler to walk away; when we had gone one square he wished to lay down, and could not walk; we took him into Mr. Harney's residence; Butler knocked the pistol from his breast, after it was fired, and went into Sturgus' recitation room; he came out a moment after, and motioned to the scholars that he was done for; think Matt. Ward struck Butler first; Butler then stepped

forward and laid his right hand on Matt's left shoulder; did not hear Butler make any remark to Ward, except asking him to step into the office, and replying to his question, that he did not feel like answering it without giving an explanation; it was then Ward replied by calling him a liar and a scoundrel; when Butler fell, he exclaimed, "I am killed: May God forgive me! My poor wife and child!" After he fired the pistol, Ward pointed the one he drew afterwards around the schoolroom for a few minutes, and then left; he walked away very deliberately; he left the pistol he had fired on the floor; it was a small self-cocking pistol, with a walnut handle; think this is one of the same description; Butler did not seem much agitated; he replied in a low tone to the question—he always spoke low; Ward's voice was loud; he appeared agitated after he had spoken to Butler, though not before; noticed by the working of his right hand that he was very nervous at the time; there were only three of the other pupils assisted Butler to Col. Harney's; no one else entered the house with us I think, but I was much agitated; after we were in the house noticed another gentleman there whose name I did not know before Dr. Thomson came in; we had laid Prof. Butler down, and he told us to set him up; should know the gentleman were I to see him; do not think the whole affair occupied more than ten minutes.

*Cross-examined.* When Ward came Butler was in his recitation room with several of the boys; do not recollect who they were;

I testified before the Grand Jury; when Ward called for Butler a boy went for him; when Ward entered observed his right hand was in his pocket, or wrapped in his coat; he held his hat in his left hand; all the boys in Mr. Sturgus room rushed for the door when they saw the Wards enter; he called us back, when I asked to be excused; he granted the request, and I went out, while the other boys returned into the room; those who remained there could not see the occurrence; can give the names of some of the boys who composed the class, and remained in the room; Robert Trimble and William Fagan were two of them; there were about forty pupils in the school; with the exception of those in the recitation rooms, the boys were then in the school room; when Ward asked the questions, heard Butler reply, in a low tone, "I don't feel disposed"—this was all I heard him say; all I have related about inviting him into his study, etc., has been told me since; thought Ward struck Butler; thought so, because I saw Ward bring down his left hand with a gesture, and Butler fall back; Butler then sprang forward and laid his hand on his shoulder; it was not done gently; did not see Butler strike at all; know he did

not strike after he was shot; Butler had not beaten Ward down, before the pistol was fired; did not hear Ward say to Butler that he had a little matter to settle with him; only heard him say; "I wish to see you;" could not hear the replies of Butler, he spoke so low:—all that I heard from him was: "I don't feel disposed;" the remark about the chestnuts, alluded to the punishment of William Ward the day before; the only thing I heard Robert Ward say to Sturgus, was: "Stand off;" immediately on the report of the pistol, Sturgus came out of the recitation room into the large hall; Butler was then on the floor; Sturgus had nothing in his hand when he came out of his recitation room; did not hear Butler invite Ward into his recitation room, now I have thought of it more fully, did not see Sturgus in his room, when Butler went in there, after he was shot; think he had run out of the window before that time; have said he was one of the worst frightened men I ever saw.

*To Mr. Carpenter.* I said in my examination in chief that I saw the Wards coming in the hall; said that I wished to be excused and left the room, and that I saw Butler come out of the room.

*Mr. Marshall.* I must object to this line of examination. The COURT has already ruled that only one lawyer shall cross-examine a witness. I now request a ruling limiting the extent to which gentlemen are allowed to repeat, word for word, the questions which they asked the witness on the examination in chief. Such a course gives an advantage to the side which pursues it, and gains the last lick, and will also render this case absolutely interminable. The defense

will have to cross-examine again and the boy will not live long enough to finish his testimony.

*Mr. Carpenter.* I have no desire to obtain any "last lick," have simply wished to save time, as I desire to recall the attention of this witness to a single point. It is my intention to seek no unfair advantage, but to conduct this case on high, professional and honorable principles.

*Mr. Marshall.* I suppose the gentleman in boasting of his highly honorable and lofty method of practice (which we have not impeached—as yet), intends to cast no imputation on other gentlemen in the case, as pursuing a contrary course?

*Mr. Carpenter.* Certainly not.

*Mr. Marshall.* Ah! Then the self-advertisement of the gentleman's numerous virtues was quite unnecessary, and given in advance of any demand for it. I renew my request to the COURT, as proper and necessary. I am sorry to see so much excitement so early in the trial and trust it will not be repeated.

The COURT. The witness may be questioned only on new matter brought out in the cross-examination, and re-examined on points in regard to which he had not been so explicit as to be clearly understood.

*Knight.* Ward struck Butler first; Prof. Butler went into the recitation room of Sturgus, after he was shot; thought Butler made a motion as if to invite Ward into his study.

*William Worthington.* Was in the schoolroom when William Ward entered; he went to the seat he had formerly occupied, and I then looked around; saw Matt. and Robert Ward standing in the hall, and Mr. Butler came out of his room; heard Matt. say: "Which do you think is the more to be despised, the contemptible little puppy who begs chestnuts and then lies about it, or my brother William, who gave him the chestnuts?"

Butler replied: "If you will walk into my room I believe I can explain the matter satisfactorily;" Ward refused; the next thing I heard was Ward asking: "Well, if you will not answer that question, will you tell me whether you called my brother a liar?" Butler replied, "I cannot answer this, unless I am allowed to explain;" did not hear all the conversation, as Prof. Butler had often requested us not to look around when people came in, and my back was towards the door; next thing I heard was a slight stamping; turned around again, just as the pistol was fired and Butler was falling; ran out at the nearest

door, and when I returned, Ward had gone, and the boys were just assisting Butler away; am eighteen years old.

*Cross-examined.* There was no other boy of my name in school; suppose it is about ten feet from the door of Mr. Sturgus' recitation-room to the point where Prof. Butler fell; Butler spoke in a very low voice;

heard his replies distinctly, however; (did not hear the expressions d—— scoundrel or d—— liar at all) only a few of the boys in the school-room could see into Butler's recitation-room; did not see Butler after I went out; the boys scattered in every direction, after the firing; my seat was between thirty and forty feet from the parties.

*Mr. Marshall.* Did you not hear the boys there, one and all, inform Mr. Allen that Butler struck Ward first?

*Mr. Carpenter.* We object to this method of examination.

*Mr. Marshall.* I do not ask the question that the answer may be admitted as proof that Butler did actually strike the first blow; but I am conducting a cross-examination, and propound it to test the memory and veracity of this witness. The testimony that he has given is of considerable magnitude. If I can show, therefore, that an important event then and there occurred, which he either does not recollect or denies here, it will show he was in such a state of mind at the time that no reliance can be placed on his account of the circumstances.

The COURT. I understand the rule to be that questions may be asked in regard to any matter outside the one at issue, to test the recollection of the witness; but there is no rule of law by which illegal testimony can be introduced, or collateral issues proved in testing the credibility of a witness.

*Worthington.* Have no recollection of seeing Mr. Allen on that day. Attend church some-

times; have been in the Sabbath School a few times.

*Mr. Marshall.* Does the gentleman desire to prove that his witness is an infidel, and that his religious education has been entirely neglected? If so, we readily admit it.

The COURT. Such questions seem to be unnecessary, and I trust will be omitted in the examination.

*Mr. Carpenter.* Certainly, if they are deemed improper.

And this seems to be hardly the place for the theatrical performances we have just witnessed.

*Mr. Marshall.* There is a great variety of theatres in this world, and you have performed characters in some of them that are by no means enviable.

*Mr. Carpenter.* So have you, sir.

The COURT. I must insist that the gentlemen refrain from remarks of this character.

*Mr. Marshall.* I desire to treat the Court with all due respect, but, sir, the gentleman has addressed a personal charge to me, and I felt bound to retort. He has accused me of assuming theatrical airs, which I must certainly repel. Why, sir, my manners are the most natural in the world, and have been too long worn to be thrown off at this late day. And when a personal and insulting remark is made commenting upon them, I need not say that it is offensive.

*Mr. Carpenter.* I intended no insult to Capt. Marshall—it was merely a side-bar remark.

The COURT. Let the case proceed without further interruption.

*James S. Pirtle.* Am thirteen years of age; was in school on second November; saw Mr. Ward come and inquire for Mr. Butler; heard him ask which was the worst, a contemptible puppy, who begged the chestnuts and told a lie, or the one who gave them to him; Butler said he would explain, if Ward desired it; he replied he wanted his question answered; and the next thing I heard, was the expression, "Whoever calls my brother a liar—" then heard the pistol discharged, and saw Butler fall, when I ran out, as I went in again, saw Robert Ward come back, and pick up a pistol laying on the floor, and carry it away; the first words I heard from Ward were something about

"ideas of justice;" and "chestnuts," during the conversation Ward had his hat in his left hand.

*Cross-examined.* Could not hear what Mr. Butler said, during the conversation; saw that he had his arms extended; did not see Butler strike Ward; my back was towards them; did not tell any one that Butler struck Ward the first blow.

*Minor Pope.* Am seventeen years of age; was in Prof. Butler's school, on the second November; Matt., Robert, and William Ward came to the school house, and while William went into the school room, Matt. inquired for Butler; went for Butler, and told him two gentlemen wished to see him;

he came out, and bade Matt. good morning; he returned the salutation, and said: "I have a matter to settle with you." Butler replied, "Step into my room"; Ward said, "No, sir—answer my question; why did you call my brother William a liar?" Butler declined answering; some other words passed between them, while I continued an exercise I was writing, when I looked up again, Ward had a pistol, and discharged it; think he took it from his pantaloons pocket; noticed his right hand in his pocket when he entered; after Butler was shot, he exclaimed, "My poor wife and child." They were very close together when the pistol was fired; noticed that Butler raised his hand just as the pistol was fired; observed Ward make one or two gesticulations with his left hand, during their conversation; Butler was between Ward and myself.

*Cross-examined.* Could not see the parties without turning; did not pay particular attention to the conversation; Ward appeared to be somewhat excited; am sure his hand was in his pantaloons pocket (when Butler raised his arms, he sprang towards Ward).

*Mr. Caldwell.* Did not Butler strike Ward when he sprang upon him, before the pistol was fired?

*Pope.* Am unable to state, as the change in his position prevented me from seeing; saw no blow struck between the two; the distance between the parties when the pistol was fired, was three or four feet.

*April 19.*

*John A. Campbell.* Am twenty years of age; was present in the school-room; when the Wards came William entered the school-room and Matt. inquired for Butler; when he came, they bade each good morning; Matt. said something about a little matter to settle; heard Ward ask, "Which is the more to blame, my brother or the contemptible little puppy who begs the chestnuts of him"; did not hear Butler's reply; then heard Ward say, "If you will not answer that question, I have another for you. Did you call my brother a liar?" The only portion of Butler's answer that I heard, was, "Well, Mr. Ward—"; Butler spoke very low; Robert Ward was standing near, and as I feared he might use some unfair weapons or something of the kind, I turned around to pick up a pair of tongs and prevent it; while I was turned, heard Ward call Butler a d——d liar; shortly after, heard the pistol fired; not more than six seconds passed between this expression and the firing of the pistol; the boys all ran out then; saw Robert flourishing a knife; did not observe the position of Ward's hands when he entered; he seemed excited—spoke a little above his ordinary tone; did not see Butler strike Ward; do not think he struck, but he made some motion towards Ward; Butler's back was to me; I turned around to look, just as I heard the expression d——d liar; knew there would be a fight then; it was just after that, that Butler made a movement towards Ward; assisted in taking Butler to Col. Harney's, and remained

there until ten o'clock that night; the only person with me whom I recollect, was Knight; saw no one but the school-boys assist in taking him there; when Butler fell, the boys all ran out immediately; followed them and told them to come back, but only a few of them did so.

*Cross-examined.* Saw Butler stagger across the entry and go into Sturgus' room; the only part of Butler's conversation I heard was, "Well, Mr. Ward—"; I was about four feet from the spot where Ward and Butler conversed; did not hear the reply, to which Ward said, "Well, if you will not answer that question, I have another for

you"; as soon as the lie passed, Ward made a motion to Butler; could not see Ward make the motion, but I heard him move; cannot tell whether he moved forward or backward; Butler's back was towards me, and between us, so that I could not see Ward distinctly; as soon as I heard the lie given, I turned around to pick up the tongs, and thus I only know that Ward made the motion by the sound on the floor; Butler then made a little, quick movement; it was not as if moving away from Ward; I thought if Butler were going to whip Matt., that Robert might interfere with a knife or something.

*Mr. Marshall.* Well, sir, was it not your impression from what you saw then that Butler was about to whip Ward?

*Mr. Carpenter.* We object to the question as improper.

*Mr. Marshall.* It will be remembered that the Commonwealth had proved by the witness that he thought there was to be a difficulty; I wish to show more particularly what he thought the nature of the trouble was to be.

*Mr. Gibson.* If his testimony on that point was improper, the gentleman should have objected to it at the time.

*Mr. Marshall.* If the gentlemen introduce incompetent evidence, and obtain the benefit of it, I suppose they will not make us responsible for it, because we did not object.

*Mr. Gibson.* We have no desire to introduce incompetent testimony at any point.

*Mr. Marshall.* I presume not, and once for all, to prevent future misunderstandings, I wish to state that in commenting upon the course of any gentleman present, I shall not assail his intentions, unless I do it plainly and explicitly.

The COURT permitted the question, in view of the previous testimony given by the witness on that point during his examination in chief.



*Campbell.* It was my intention, when I picked up the tongs, to keep Robert off while Butler whipped Matt.; knew of course, that he would not stand the d——d lie; Butler was a courageous man—he would not stand an insult; there was something about Butler's movement—I don't know exactly what—that induced me to believe he was go-

ing to resent the insult he had received; Butler could not have whipped Ward; it was my impression from the appearance of Matt. Ward when he came in, that he was in good health; he had no such wan, pale, feeble look as he wears now; never saw Butler fight, or knew him to have a quarrel.

*Mr. Marshall* objected to going into the general character of Butler. The defense were ready to admit at once that he was a peaceful, quiet, decorous gentleman; and that no one could possibly regret his death more deeply than the parties now on trial. His questions had only elicited the fact that the deceased—to his honor be it spoken—was a brave man, who would not bear an insult—not that he was a quarrelsome one.

*Mr. Carpenter* said that as the fact was admitted, the questions would not be pressed.

*George W. Crawford.* Am seventeen years of age; was in the school-room when the Wards came; Matt. asked Butler which was the worst, a contemptible little puppy who begged the chestnuts, and then lied about it, or his brother who gave them to him; Butler replied: "Walk into the next room and I will explain it to you"; Ward said: "I want an answer here, and if you will not reply to this question I have another for you; did you call my brother a liar?" Did not hear the answer, and Ward said something more which I did not hear; Ward advanced towards Butler; noticed that Butler's right hand was on Ward's left shoulder, and Butler's left hand was catching at Ward's right arm; just then the pistol fired; my back was

towards the parties; Ward held his hat in his left hand and gesticulated with it; held the pistol in his right hand when he fired it; did not see the pistol until the very moment he fired; saw no striking; Butler staggered towards the door of Sturgus' room and fell; afterwards got up and started to enter the room.

*Cross-examined.* First heard Ward say something about settling a little affair or something of that kind; I was eight or ten feet from them when they conversed; heard Butler distinctly ask Ward to walk into the next room; Butler spoke in his ordinary tone; he said: "This is no place to answer such a question"; did not hear the latter portion of the conversation; anticipated no difficulty;



did not hear the lie given at all; Ward moved about three steps towards Butler; Butler did not approach him; expected a difficulty then; judged that Ward had a knife, from the tone of voice in which he spoke; there was a noise in the room which prevented me from hearing the d——d lie given.

*A. B. Zanzinger.* Am seventeen years of age; was present in the school-house when this affair occurred; a servant came there that morning, for Victor Ward and his books; about ten o'clock, was reciting in Sturgus' room; while we were there there was very loud talking in the school-room; Sturgus and the most of the class stepped to the door and saw Matt. Ward engaged in loud conversation with Butler; Sturgus called us back and the recitation went on, the door being closed; shortly after we heard a pistol discharged; we went out immediately; Butler had then been lifted up; Matt. Ward had gone and Robert was flourishing a knife about the room.

*Cross-examined.* Did not notice whether Butler was on the floor or not, when I went into the school-room the second time; jumped right out of the window, and saw the boys taking Butler up towards Col. Harney's house; Butler was not brought into Sturgus' recitation-room while I was there; did not see Sturgus after I went back into his room the second time; do not know what became of him.

*William H. Fagan.* Am eighteen; was in Sturgus' recitation-room; heard one of the boys say, "Mr. Wards are there";

went to the door for a moment, and then returned; just then heard a pistol discharged; went to the door again; Matt. Ward had gone; Butler was on the floor and Robert was flourishing a knife; jumped out of the recitation-room window and went around to the steps; in about three minutes Butler came down the steps assisted by Knight, and we assisted him to Col. Harney's; believe no one else took hold of him except Johnson; there were men walking along with us.

*Cross-examined.* It is one square from the school house to Col. Harney's; Butler fell into my arms while we were on the way, and we then carried him in our arms.

*Davis M. Buckner.* Am thirteen; was in Butler's recitation-room, when a boy came in and told him Mr. Ward desired to see him; he went out, and shortly after, hearing loud voices, I went to the door; Ward just then shot Butler, and he fell near the door of Sturgus' room; heard none of the conversation; went back and jumped out of the window.

*Cross-examined.* Butler and Ward stood very near together when the pistol was fired; think Butler was standing still; did not notice any scuffling; was a good deal scared; after Butler had left the house, I saw Sturgus going after Dr. Caspari.

*Henry C. Johnson.* Am fifteen; was in Butler's recitation-room, when Minor Pope came in and said two gentlemen wanted to see Prof. Butler; he went out; could hear Butler and Ward in earnest conversation, but could

not hear what they said; saw the pistol fired, and Butler fell towards Sturgus' room; jumped out the window.

*Cross-examined.* We supported Butler to the corner of Second Street; he then wanted to lay down, and said he was dying; we carried him from there to Col. Harney's; stood about ten feet from Butler and Ward; did not hear a word that was said; could not distinguish the voices apart.

*Joseph Benedict.* Am fourteen; was present at Prof. Butler's school-house when the defendant came; was standing in the main school-room; when called for, Butler came out and spoke to Ward politely; Ward asked which was the most contemptible, the little boy who begged chestnuts and then lied, or his brother William; did not hear Butler's reply—he always spoke very low; there was more conversation, but I could not hear the words; saw Butler step forward and lay his right hand on Ward's shoulder nearly at the same instant saw the pistol flash; did not see Butler strike.

*Cross-examined.* Had risen from my seat, and was still standing at it to go into the recitation-room and ask Prof. Butler something about my French lesson, when he came out to speak with Ward; did not hear a word that Butler said; (expected a difficulty when I saw Butler lay his hand on Ward's shoulder; I knew he would not do it for nothing) believe Butler pushed Ward back when his hand was on his shoulder; saw that Ward was bent over as he was pushed back, before the pis-

tol was fired; do not recollect whether two gentlemen came there and spoke with us, or not; was so excited that I could hardly think or see any thing; did not tell any one there that Butler had struck first and Ward had then fired.

*Edward Quigley.* Am seventeen; was present in the school-house, sitting about twenty steps from the door, when the Wards came in and inquired for Prof. Butler; he came out and spoke to them, and they then conversed in a very rapid manner; was about twenty feet from them, but could hear none of the conversation; when I looked at them again, Butler had his hand on Ward's shoulder; Ward gave way a little, and was pressed back against the door; he then fired, and Butler fell; did not see Butler strike Ward.

*Cross-examined.* When Butler put his hand on Ward's shoulder, they were about eight feet from the door; he did not crush him to the ground—only towards the door; about five minutes passed between the time of Butler coming out, and the firing of the pistol; went out of the window through Butler's recitation room; did not see Sturgus after the affair took place, until he came across the street with Mrs. Butler; may have seen some gentlemen come up, while there; cannot say what I may have said to them; I was much excited; sat facing the parties in the room.

*William R. Redding.* Am sixteen; saw Matt. and Robert Ward come in and stand near the door; one of the boys went

for Butler, who came out and bowed to them. Ward said: "I have come to see you about that affair"; Butler asked him to step into the recitation room, but he replied, "No, I want to talk here"; other conversation ensued which I could not hear, though I caught the word "liar" once; I heard the report of a pistol, and as I looked around, Ward was just taking his hand away from Butler's breast, and Butler fell; the scholars then retreated, and I went with them; was not looking at the parties all the time during the conversation; did not see Butler strike.

*Cross-examined.* After the occurrence, was in the front yard for about a minute; do not recollect seeing any gentleman come while I was there; did not tell any one that Butler struck Ward first.

*J. J. Gillmore.* Am a gunsmith; on the morning of second of November last, Matt. F. Ward came into our store about nine o'clock; he asked to look at a pistol; he took it, examined it, asked the price, and told me if I would load it he would take it; did so; he then hesitated a moment, asked the price of the pair; told him, and he said if I would load the other he would take the pair; loaded the other, and he took them; he inquired for small pocket pistols; the pair I sold him were small, self-cocking ones; this pistol is one of the same kind; they are good pistols; suppose they would shoot through an inch plank, two feet from the muzzle; loaded each of them with powder and ball, and put caps on them; they were fully prepared for

use; did not observe whether he put them in his pocket; do not recollect that he said he wanted pistols that were certain, or any thing of the kind.

*Mrs. Martha A. Harney.* Reside in Louisville, on Chestnut street, between First and Second; on the morning of the second November last, between nine and ten o'clock, met Mr. Matt. Ward on Third street, near the Post Office; he seemed to be under excitement; there was a firmness and determination in his appearance I had never seen before; think he had one of his hands in his pocket and the other by his side; returned home and found Prof. Butler there lying on the rug in the parlor; the house was full of people; when I entered the room he raised his hand to me in recognition; knelt by his side and begged him to be composed; he seemed much agitated: I told him to be quiet, as much depended on it, that the physicians thought it was only a flesh wound, and we hoped he would recover; he said he could not; he said, "No—do not be deceived—I cannot live: when I am gone, will you be kind to my poor wife and baby?" He desired to see Mrs. Butler; seemed impressed with the conviction that the wound was mortal; was with him until his death; brought Mrs. Butler; he died the same night between twelve and one o'clock.

*Cross-examined.* Am the wife of Mr. Harney, the editor of the Louisville Democrat.

*Mrs. Elizabeth Butler.* When Mrs. Harney took me to my husband, he told me not to be deceived—that he was dying; told

him to be calm—that the physicians thought he would recover, but that every thing depended on his being kept quiet; he said, “No, Lizzie—don’t deceive yourself—I am dying”; he thought, until his death, that the wound was fatal.

The *Counsel for the Defense* declined asking Mrs. Butler any question, remarking that they had no desire to inflict suffering upon her by calling her mind to the details of the unhappy occurrence.

*Dr. D. D. Thomson.* Reside in Louisville and practise my profession there; shortly after ten, on the morning of second November, was called to Col. Harney’s residence to see Prof. Butler; he was deathly pale and faint, he asked me if he was not a dead man; told him I hoped not, but could not tell until I had examined the wound; we took off his coat and tore open his shirt; the wound was on the left side, about inch and half obliquely above the left nipple; it was much burned with powder around it; attempted to probe it but failed to do so, being unable to follow the wound; I then asked him in what position he stood when he received the ball; he replied that they were clinched said Ward had come to see him, they had had a conversation in which Ward called him a d——d liar, and struck him; that he struck back and was shot, but did not see who fired the pistol; Dr. Caldwell came in, and assisted, but we succeeded in tracing the direction of the ball only a short distance, as probing was very painful; we did not pursue it further, and gave him

something to allay the pain; some fifteen or twenty minutes after, a noise proceeded from the wound. Dr. Flint said that the ball had passed into the cavity, and forced the air out through the blood, causing the noise; Butler then said he was a dead man; about four o’clock in the afternoon he seemed better, and we hoped a reaction would take place; but he soon commenced failing again, and continued to do so until he died; he seemed fully convinced all the time after I saw him, that he was dying; we deemed it useless to punish him by probing further; Prof. Butler was a man who would weigh about 135 or 140 pounds; his right hand was disabled, so that it could not be straightened after his death; there can be no doubt the wound caused his death.

*Cross-examined.* When I arrived at Col. Harney’s, several boys and some ladies were in the room with Prof. Butler; saw Mr. Sturgus, after I had been there awhile; recollect seeing no other man there except him—two or three boys assisted me in stripping Prof. Butler; think Knight was one of them; think Dr. Yandell came in while I was probing the wound; Dr. Caldwell came in shortly after; at his suggestion we attempted to probe the wound while Prof. Butler’s arm was held up, thinking that his hand must have been raised while he was clinched with Ward, and supposing that we could ascertain the direction of the ball more successfully, while his arm was in the same position; while Butler was speaking about the matter, Drs. Yandell and Caldwell

were both in the room, and near enough to hear him distinctly.

*Mr. Wolfe.* Is it customary in Louisville for young men to go armed? I do not know.

*Mr. Wolfe.* Are you not armed now, sir? Did you not arm yourself before you left Louisville? I shall decline to answer unless I am directed to do so by the COURT.

The COURT. The witness is not compelled to answer the question unless he sees fit.

*Dr. L. P. Yandell.* Am a practising physician in Louisville; saw Prof. Butler shortly after he was shot, he seemed to be mortally wounded; Dr. Thomson was attempting to probe the wound, and when Dr. Caldwell came in, he attempted to assist; the probes did not seem to penetrate the chest, and we expressed hope that the wound might not be fatal; shortly after, however, I heard the blood issue from it in a manner that convinced me the ball had entered the cavity; I asked him the position he was in as he received the wound, he replied that they were clinched; that Ward called him a d——d liar or scoundrel, and raised his hand; that he (Butler) then struck Ward—they clinched, and he was immediately shot; Butler did not state in my hearing, that Ward had struck him at all.

*Dr. Muguet.* Went to see Prof. Butler after he was shot, and remained until his death; was present at the *post mortem* examination; was well acquaint-

ed with Prof. Butler; his right hand was always disabled; he could not open or close the fingers of it.

*Patrick Joyce.* Prof. Butler could not open the fingers of his right hand; first knew from observing once in the French Assembly, that when a lady asked him to point out Cavaignac or Lamartine, he indicated the place where he sat with his arm, but his fingers were pointed in quite another direction, nearly at a right angle, he misled the lady, who followed, with her eye, the direction of his fingers instead of his arm.

*Cross-examined.* Butler was a man of very fair strength in his arms; he was in the habit of exercising with his arms, in the gymnasium; think he was stronger than the average of young men, who frequented the gymnasium; once crossed the ocean with him, and had an opportunity to notice that he had much more strength than I had; have seen him show great alacrity in climbing ropes, hand over hand, and other feats of dexterity on ship-board; have also seen him suspend himself by his hands upon horizontal poles in the gymnasium, and then draw up his body.

*Mrs. Frank Carter.* Assisted in gloving Prof. Butler's hands after he was dead; it was impossible to open his right hand, which was much contracted; saw no gentleman there but Dr. Thomson, when I entered.

#### TESTIMONY FOR THE DEFENSE.

*Dr. W. B. Caldwell.* Was called to see Prof. Butler, soon

after he was shot; Dr. Thomson and Dr. Yandell were with

him, and some other persons whom I do not recollect; asked him his position at the time he received the shot; Butler replied he did not know which one shot him, as they were engaged at the time; the probe would not penetrate, until the arm was raised, as a man's would naturally be, when engaged in conflict; did not hear Butler say that Ward struck him.

A number of witnesses, eleven in all, testified here to the good character and peaceable disposition of the prisoner. Among them were *Rev. E. W. Schon*, an Episcopal Minister of Louisville, *J. Perkins* and *William Preston*, members of Congress from Louisiana and Kentucky, *James Guthrie*, Secretary of the Treasury, *George D. Prentice* of the *Louisville Journal*, *Isaac H. Sturgeon*, St. Louis, Mo. Some of them spoke of him as not robust and in poor health.

April 20.

*Dr. J. B. Flint* (called by the

State). Am a physician residing in Louisville; had known Prof. Butler some ten years; one of his hands were crippled by a burn when he was young, so that the fingers were contracted; he could not open his hand wide, nor close it so as to grasp; nor double his fist exactly like other men; was called to see him on the day he was shot, about 10 o'clock; attended the *post mortem* examination; the ball was extracted from the back bone where it was imbedded; while Butler lived Dr. Thomson remained with him during my absence, and I staid with him while Dr. T. was absent; did not hear Butler converse with any one I did not know, while I was in the room.

*George D. Prentice*. About five hours after the difficulty with Butler, saw Matt. Ward, a portion of the cheek and the eye were unusually red and appeared swollen; should not have inferred that a severe blow, but some injury, had been received.

*Mr. Wolfe*. Will you tell the jury whether it is the ordinary custom in Louisville to carry arms?

*Mr. Carpenter* objected.

*Mr. Helm*. We desire to prove the custom with a view to rebut and repel any presumption of malice on the part of the defendant. It is usual to carry arms, especially in large cities.

*Mr. Carpenter*. An illegal custom cannot be shown to justify a wrong. There are many bad customs which it is the object of the law to break up. The custom of shooting persons is too common. If it could be shown that every man in Louisville was in the habit of bearing arms, it could be no mitigation in this case. A custom could not justify a breach of law.



The COURT. The Commonwealth had shown defendant to have procured pistols on that day; the question now at issue was, whether this killing was done in self-defense, in the heat of passion, or maliciously. Any facts tending to show the motives of the accused were legitimate. If the defense could show that it was the custom in Louisville to carry arms, it might remove imputation of malice. The carrying arms for defense was not illegal. The question is proper.

*Mr. Prentice.* My impression is that the proportion of those citizens who bear arms habitually, is small. Nevertheless, almost every young man, if he is expecting an interview which is unpleasant and may result in collision, especially with a person of superior strength, arms himself. Have known numerous instances in which it has been done—not to commit violence, but to prevent disgrace.

*Maj. T. L. Alexander.* Am an officer in the U. S. Army; saw defendant about half an hour after this difficulty; saw on his left cheek the appearance of a blow; have often known arms borne on the person in Louisville; do not know that it is always done, but it is usually the case when a difficulty is anticipated; have done it myself; it has universally been done for purpose of defense, not assault.

*John O. Bullock.* Saw defendant within an hour after the difficulty with Prof. Butler; one of his cheeks was much redder than the other; it was my belief that he had received a blow; never heard character of defendant questioned; he has uniformly been considered of a remarkably peaceable and quiet disposition, both as boy and man; his health is very feeble,

and has been delicate for years; he weighed 111 pounds.

*J. M. Barlow.* Reside in Louisville; am a carpenter; am a married man; was born in Kentucky, Harrison county; on second November, passed the Louisville High School, met Mr. Ranson's little boy; noticed that the boys were all out, some without their caps on, and wondered what was the cause; the little lad told me that Matt. Ward had killed Mr. Butler; asked if he was dead yet, and he replied, No; saw the boys taking Prof. Butler to Col. Harney's; followed them there, but did not go in; returned to the school-house, and while I stood there Dr. Thomson came up; asked if he was going up to attend Prof. Butler; he replied that he was, and I went with him; we entered and found him lying on a rug in the middle of the floor in front of the fireplace; the doctor commenced fumbling over him, and I suggested that it would be well to take off his coat; we did so; a young man there, whose name I did not know, assisted in taking off his coat; while we were doing so, I asked him, "Who done this?" He replied, "Matt. Ward did it"; I then asked, "What for, sir?" He said, "I had been correcting one of the boys for disobeying

the regulations of the school, and they both came to the school-house; Matt. said he had come to seek for an explanation, and in the conversation, he gave me the d——d lie; I struck him for it, and in the fuss, he threw his right hand round against my breast and fired; the pistol stuck in my coat, and I afterwards knocked it out."

When we had got the coat off, Dr. Thomson cut open his shirts with a pair of scissors; Drs. Yandell and Caldwell came in a moment after, and they attempted to probe the wound; they did not succeed, however, the probe going up towards the arm-pit; the wound was about an inch and three quarters from the left nipple; Dr. Thomson remarked that the wound was not dangerous, and I then left; called again at one o'clock, and Dr. Thomson told me he was very poorly, that they had found the ball had entered the cavity of the heart; saw Butler no more after this; Dr. Thomson was in the room while I was conversing with Butler, he had not then commenced to work on Butler, as his clothes were not taken off; Butler had on a black, half-sack coat, and a satin vest; a black silk handkerchief on his neck; he wore a dickey.

*Cross-examined.* Never saw Prof. Butler until that day; had known Dr. Thomson by sight for two years; am thirty-six years of age; have talked with Mr. Mays in regard to this matter, told him on that day that it was a most aggravated murder, or something to that effect; told Mr. Ward himself, that I was as much against him at first as any

one; went to see Mr. Robert J. Ward six weeks after the occurrence; have spoken to Mays and Sullivan about the matter; asked Mr. Ward if it would do any good to have a witness who would prove that Butler struck Ward first; he said that was the evidence they wanted; told him I was one who could prove it; he asked me if I would meet him at Mr. Wolfe's office the next morning; told him my business was such that it kept me the whole day; he told me I should lose nothing by going; I told him I did not wish to be understood in that way, only that I was compelled to work for my living and could not lose my time; never told Mays or Sullivan that he told me I should be ten times repaid, or amply repaid; it was between nine and ten o'clock when I passed the school-house that morning; it was twenty minutes of eleven that morning when I got back to the shop; Dr. Thomson had his case of instruments in his hand as we walked from the school-house to Col. Harney's; he sent out for some brandy, and gave Prof. Butler some; have never bet that Matt. Ward would be cleared here by this jury; never offered to bet Mr. Sullivan \$25 that this would be the case; first went to see Mr. Ward of my own accord, and because I considered it a duty; have said I expected to go to California after this trial; may have told Mays and Sullivan that I had played cards in jail with Matt. Ward and Mrs. Ward for amusement.

*Direct examination resumed.* Never bet a five cent piece on the result of this trial; there



was an immense excitement in Louisville after the occurrence, and I participated in it; heard numerous statements that it had been testified in the Police Court that Ward struck Butler first, and it was after this that I went to see Mr. Ward; knowing that Prof. Butler had made a contrary statement to me, deemed it my duty to go and inform him of the fact, that was what prompted me to do it; within half an hour after I left Prof. Butler, I told Mays and Sullivan, and at dinner Mr. and Mrs. Crenshaw, all that Butler had said to me; Mr. Ward never offered me a dollar, I never asked one dime, and I never had any hope, expectation or desire, of any fee or reward for my testimony here either from Mr. Ward or any one else under God's heaven.

*Mr. Carpenter* disclaimed any intimation or insinuation of any thing derogatory to the character of Mr. Robert J. Ward. He had not the pleasure of his personal acquaintance, but knew him well by reputation for a high-toned and honorable gentleman. The Commonwealth, in pursuing their course of cross-examination, had by no means desired or expected to compromise him in the least; it had merely been done to show that the witness had been in the habit of making numerous unreasonable and untrue statements in regard to the whole matter, and was therefore unworthy of credence.

*James M. Allen.* Reside in Yazoo City, Mississippi; was in Louisville in November last; on the day of the accident, in the morning, I was sitting in the of-

fice of a hydropathic establishment, where I was a patient; when Mr. Sturgus entered and said: "For God Almighty's sake run for a doctor, Prof. Butler has been shot, and is killed!" He ran out, and just then Matt. and William Ward passed the door of the office; Gudgel and myself, went towards the school-house; in the yard in front of it there were some ten or fifteen boys; went in and made some inquiries; one of the lads was Mr. Worthington's boy—the other I had frequently seen, having often exercised in the gymnasium with them; they were pupils there; asked where Mr. Butler was; shook hands with young Worthington, and addressed the question to him; he replied that Butler was gone; asked how this happened; the boys were all collected around me and seemed anxious to communicate; several of them answered my question, and Worthington, though he did not speak, nodded his head in assent.

*Mr. Crittenden.* What was the answer which you received?

*Mr. Allen* objected to the question, contending that the expressions of the school-boys could not be evidence unless they were identified as the individual boys who had testified here.

As the witness had understood Worthington to assent to the statements made by the other boys at the time, the Court ruled the question to be legitimate.

*Mr. Allen.* Several boys spoke at once and replied that Ward came there and cursed Butler; that Butler then struck him and Ward fired; think one of the

boys said Butler took hold of Ward.

The COURT. I have admitted this evidence only so far as it affected the testimony of Worthington, not as evidence respecting the occurrence.

Mr. Helm. Most of the boys, if not all, were present at the time. Some of them remembered those gentlemen coming up. This was part of the *res gestae*. In the case of Lord Gordon in England, the cries of the mob were admitted. The question of identity is for the jury. The prisoner should not be deprived of this important evidence because the witness could not identify the school boys.

The COURT. The evidence is admissible only as impeaching the testimony of the boys. The boys must be proven to be present. The cries of the boys was not part of the *res gestae*.

J. T. Gudgel. Accompanied Mr. Allen to the school-house after the unfortunate affray; Butler had gone, but there were fifteen or twenty boys about there; we inquired how the matter occurred; addressed the inquiry to the whole crowd of boys who were there; five or six answered that Ward had come to demand an apology of Butler; that Butler had refused to give an apology, and ordered him out of doors; all said that Butler had struck the first blow, and Ward had then fired; some of them said Butler had pushed Ward back and nearly thrown him down, and that as he was getting up he fired the pistol; before we reached the school-house, I met a boy whom I think to have been young Benedict; he was crying, and we asked the

cause of it; he said that Ward had shot Butler; said he was present, and gave the same account of the matter I have stated; heard the boys reply to Allen's questions; was not acquainted with the Wards at the time; have only met them once or twice since the occurrence.

J. J. Hershbell. On the day of the occurrence, saw Matt. Ward; had a music box to repair for him, and he sent a servant for it, who took it away before it was done; he told me if I could get it repaired by the next Monday he would send it again, but that he must have it then, as he was about to leave for Mississippi, or some other point in the South; it was between nine and ten o'clock; he was going in the direction from Gillmore's store to his own house; did not observe any thing angry, or anxious or agitated in his manner; it was that of a courteous, composed gentleman.

Mrs. M. A. Beattie. Reside in Louisville; keep a millinery and fancy store; was employed in November last, in furnishing articles of clothing for Mrs. Matt. Ward, preparatory to their departure for the South; late in the afternoon of the day previous to the affray, Mr. Matt. Ward, accompanied by his wife and sister, came into my store, and made purchases; there was a cap to be made for Mrs. Ward, which they said I must have completed very soon, as they were about to leave.

Lawrence Richardson. On the evening previous to this affray, overtook defendant and his lady, on the street, and he spoke of their intention to leave for his

plantation in Arkansas; they were out making purchases preparatory to going.

*Capt. Peyton A. Key.* Am the Captain of the steamer Belle Key; she descended the Ohio from Louisville on the Tuesday succeeding this affray; the day set for her departure was Monday, and defendant and his wife (who is my daughter) had previously engaged passage on her; they were going to Willoughby, his plantation in Arkansas.

*Robert Johnson.* Made arrangements to descend the river with the defendant, in November last, on the Belle Key; think the boat was to have started on Saturday following this affair, but did not leave until Monday or

Tuesday; Mr. Ward was detained, by this occurrence, from going; the arrangements to go had been made some days before the affray; saw defendant on the day of the affray, after it was over, noticed effects of an injury on his cheek, it gave the impression of a blow having been received there; defendant's health has been very feeble for many years; he was laboring under an attack of rheumatism when this affair took place; have often seen him when he was unable to walk at all without the aid of crutches.

*Robert J. Ward.* Defendant is my son; was apprized of his intention to go to the school on second November, and the purpose for which he went.

*Mr. Gibson.* I object to any statements made by the accused, to the witness, prior to his going to the school house, being detailed. The charge here was wilful, deliberate murder, and the statements he made before the transaction could no more be made competent evidence, than statements which he might have made afterwards.

*Mr. Crittenden.* It is both proper and important to show for what purpose this defendant visited the school room of Prof. Butler. It was simply this we desired to elicit, and nothing more.

*Mr. Carpenter* was aware of no rule of law or reason by which the conversation of a defendant could be introduced as testimony in his favor. His acts spoke for themselves, and only conversations which took place during the acts themselves, and thus formed a part of the *res gestae*, could be admitted. If the witness knew of his own knowledge, the purpose of the defendant, there could be no objection to him stating it; but not from any statements made by the defendant to him. A prisoner cannot manufacture his evidence for himself.

The COURT. The Commonwealth had proved defendant to have gone to the school room. This circumstance was unex-

plained, and it was important to elicit his real motive in doing so. The COURT was aware of no more ready method of learning his purpose, than declarations which he made at the time of going. Whether the motives there expressed were true or feigned, was a question for the jury to decide. The rule in regard to admitting declarations could not be specifically limited, but must be left in a great degree to the discretion of the COURT. Declarations in regard to the intention of the accused, are admissible, if they are confined to the time occupied in preparing for the act.

*Mr. Ward.* My wife and myself returned from a trip to Cincinnati, very unexpectedly; after we reached my residence, went into my wife's room and found her and my son Matt. conversing in regard to the whipping William had received at school, on the day previous; Matt. remarked that he would go to the school-house and ask an explanation and apology from Mr. Butler; I replied that I would go myself; he said that he would go, as he had concluded to the night before, as Butler was a young man and this had been done during my absence; that he apprehended no difficulty for Mr. Butler was a gentleman, and would do what was right, by making in the presence of the school the apology a gentleman ought to make: Robert did not hear any of this conversation; my wife said that as he (Matt.) was feeble

and had had one difficulty with Mr. Sturgus, he had better take some one with him; just then Robert came in and he was sent with Matt.; Matt exhibited no anger or agitation; I assented to him going; from sixteen years my son has suffered from feeble health, for two months, up to two weeks previous he had been compelled to use crutches; he was very delicate at the time; when I entered the house after he returned, his wife and mother were in great distress, and I heard him say to the former, "Would you have me beaten like a dog?" Observed his eye and cheek were swollen, with apparent marks of a blow; knew Butler well, he was once a private teacher for twenty months in my family—was a great favorite there; defendant was absent travelling in Europe at the time, and never met Butler until they both returned from Europe.

*Mr. Crittenden* said he wished to prove that Mr. Ward had made a special agreement with Mr. Butler that his children should not be whipped in school; if they did not behave with propriety they should be sent home and he would correct them; that this second whipping, under the circumstances, was pecu-

I went to his house, Robert came to the door; asked where Matt. was, and he replied quizzically that he had "vamosed," but Matt. hearing my voice and recognizing it, came out; told him he must submit to an arrest; he said "Certainly," and in a few minutes, as the weather was very inclement, put on his overcoat and went down to the jail with me; have known him from a boy; he has always borne a most irreproachable character.

*Cross-examined.* If he had attempted it he might have made his escape from the town; there was time for it. I know of no attempt on the part of defendant to escape from jail; never saw the slightest indication of such an intention, though I have watched him closely.

*Capt. James W. Brannon* (recalled.) Believe it is the general

custom in purchasing pistols to have them loaded where they are bought.

*April 21.*

*John Judt.* Was a scholar of Prof. Butler at the time of the difficulty; Pirtle was also a pupil at the time; he told me afterwards that Mr. Butler had struck Mr. Ward.

*Cross-examined.* Do not recollect when it was he told me, there were several boys present; do not recollect who; do not remember of Pirtle saying that Ward struck Butler first; my father is a preacher; it was some months after the occurrence that Pirtle told me this; was in the school-house while the difficulty occurred; did not see either of the parties strike, but heard the report of the pistol.

*Robert Adams.*

*Mr. Wolfe.* Do you know of instances previous to this in which defendant had purchased pistols and had them loaded?

*Mr. Allen* objected.

*Mr. Wolfe.* The prosecution had endeavored to leave the impression on the jury that defendant having the pistols loaded before he left the place where he purchased them was remarkable, and inferred an intention to commit violence. We now desire to prove that this was a general custom, and that defendant, on former occasions, had purchased pistols there, and had them loaded,—not for any specific purpose,—but, as he lived in Louisville and the South, to defend himself in case of an unexpected emergency.

*The Court.* I have no doubt of the legitimacy of any testimony going to elicit the motives that influenced the mind of the accused; but the introduction of this testimony would open an entirely foreign issue, as the motives that influenced the mind of a man on one occasion, might not at another.

The general custom might be proved, but this testimony could not be admitted.

*Mr. Allen.* The gentlemen have been arguing the case, and I hope the COURT will instruct them to omit their pleas till the proper time. I notice that when the defense wishes to get a statement before the jury, they made it in argument to the COURT on some question of law.

*Mr. Helm.* Such young men as myself and Mr. Crittenden stand in need of instruction.

*Mr. Allen.* We feel that we are mere swivels arrayed against twenty-four pounders, and we wish their range properly limited.

*Mr. Helm.* Some of your swivels will hardly pay the cost of transportation here.

*Mr. Carpenter.* The presence of these swivels seems to trouble you much.

The COURT. Gentlemen, order. There is enough to do without spending time in these remarks.

*Mr. Helm.* I know it. But when the gentleman talks of cannon and swivels, we have a right to retort.

*Mr. Marshall.* This seems like being shot.

*Mr. Crittenden.* I prove by Mrs. R. J. Ward a single fact as explanatory of the necessity of this defendant arming himself; this fact is, that some months prior to the occurrence of the fact we are now investigating, Mr. Sturgus, the assistant teacher of Prof. Butler, had become so much embittered against this defendant, that he had left with her a threatening message against him, and desired her to deliver it. The Court would not feel inclined to censure the accused for desiring to have every fact made known in any way connected with, or having any bearing upon, a matter in which his liberty, his life and his honor, were so deeply concerned.

The COURT held, that though the fact might have an indirect bearing on the case, it was so remote that it would be incompetent testimony.

*Robert J. Ward, Jr., called.*

*Mr. Gibson.* I object to Mr. Ward being called as a wit-

ness, as he is jointly indicted as a principal, with the defendant.

*Mr. Crittenden.* The defense are no strangers to the cases cited by Mr. Gibson. But it was admitted in them all that if the indictments were separate, persons indicted for the same crime could be witnesses for each other. But this made no difference in principle—the fact that their names were on the same instead of different pieces of paper. But these were higher and older authorities than those the gentlemen had cited and which placed the question beyond doubt.

Some crimes require more than one to commit, as a riot. In such cases, there was a community of guilt, and whether the criminals were indicted separately or jointly, they could not be witnesses for each other. But where the crime could be committed by one, this reason for excluding another impleaded for the same crime, did not exist. *Mr. Crittenden* commented severely on the opinion of Lord Ellenborough, that the jury would be imposed on by an accomplice, and vindicated the ability of the jury to discriminate between truth and error.

*Mr. Wintersmith* cited Russell on Crimes, in support of the point—that a witness could not be excluded because he stood in the same relation as the criminal.

*Mr. Gibson.* This is the first time that a motion is deliberately made to throw aside all the books, all authorities, all precedents, and trust to the mere personal opinion of the Judge. As the gentleman has sneered at English authorities, and referred to Kentucky authorities, I will give him a Kentucky authority, one not spoiled by being put in a book. I referred to the case of the two Kelleys, tried in Hart County, where the Judge refused such a motion. There was also another objection to this admission. R. J. Ward, Jr., was indicted as an accessory, and his testimony might acquit the principal, and of course acquit himself.

The COURT. The majority of Kentucky decisions is in favor of the admission of the witness. The weight of English authorities is against it, but they had been much modified by prac-



tice, without legislative authorities, and were originally founded on technicalities. The object of a trial was to ascertain the guilt or innocence of the prisoner, and all evidence not directly inadmissible ought to be admitted. The practice was different in different states, but Kentucky decisions were in favor of the admission. The credibility of the witness must be left to the jury. He is competent as far as his admission is concerned.

*Robert J. Ward, Jr.* I arrived home from Cincinnati early on the morning of this occurrence; saw my brother Matt., his wife and mother, at the front door; Matt. told me to get my hat and come with him, said he was going around to ask an apology of Mr. Butler for whipping William very unjustly and severely; William was with us; on the way Matt. told me he did not wish me to interfere either by word or action; William said to Matt., "You know, brother, that Mr. Butler is a stronger man than you are, and Mr. Sturgus has a big stick there"; Matt. replied, "I apprehend no difficulty; I believe Mr. Butler to be a just man, and have always found him such"; he told me again not to interfere unless both Sturgus and Butler attacked him; met Lucy Stone on the way, in Bloomer costume, and we talked of that, among other matters; when we reached the school-house William went in for his books; and on being called for, Prof. Butler came out of his room with a lead pencil in his hand; we bade him good morning, and he bowed, in reply; Matt. then said: "I have called around, Mr. Butler, to have a little conversation with you"; he replied: "Walk into my private room"; Matt. said: "No,

the matter about which I wish to speak with you occurred here, and this is the proper place to speak it: Mr. Butler, what are your ideas of justice—which do you think the worse, the little boy who begs chestnuts and scatters the hulls on the floor, or my brother William who gives them to him?" Butler replied: "I will not be interrogated, sir," at the same time buttoning his coat up to his throat, and putting the pencil in his pocket; Matt. said: "I have asked a civil question, and have a right to a civil answer, which is the worse, the contemptible little puppy who begs chestnuts and then lies about it, or my brother William who gave them to him?" Butler answered: "There is no such boy here." Matt. said: "Then that matter is settled, I have another question to ask, You called my brother a liar, and I must have an apology for it." Butler answered: "I have no apology to make." Matt. asked: "Is your mind fully made up about that?" He replied: "It is, I have no apology whatever to make." Matt. then said: "Then you must hear my opinion of you. You are a d——d scoundrel and a coward." Butler sprang forward, pushed my brother back against the door,



and struck him; am not quite positive as to the number of blows, but I saw him strike twice; he then fired the pistol; I did not see the pistol until he fired; Mr. Sturgus then came out of his room and advanced a few steps; I was excited, and thought he had something in his hand with which he was going to attack brother; I drew my Bowie-knife, telling him to stand off; he then retreated; when we had left the school-house, William said—

*Mr. Carpenter.* Stop, sir, stop.

*Mr. Marshall,* to witness. Keep cool, don't be offended at the manner of the counsel, we will attend to that.

*Mr. Carpenter.* Well, we will.

*Mr. Marshall.* Yes! we will.

*Mr. Carpenter.* Certainly, we will.

*Mr. Marshall.* Damned, if we don't.

*Ward.* Matt. said he had forgotten the pistol, and I went back for it; the knife I wore on that occasion was one I had worn for six months constantly; at the time the pistol was fired, my brother was crushed back against the wall, in a corner, as far as he could get, and bent down; Butler then had him by the collar or cravat, and did not let go for a second, after the pistol was fired; during the conversation was very close to the parties—within half a foot of each; when Butler pushed my brother back, it took them some four or five feet from me.

*Cross-examined.* Took no part in the transaction either by word or deed until Butler had fallen; did not go up the aisle

and flourish my knife when Sturgus came in; he came three or four steps, and I stepped towards him, and told him to stand back; he then retired into his room; when I returned to get the pistol, spoke with a few of the boys to inquire where it was; did not speak with any of them, before I left the school-house first; have no recollection of flourishing my knife towards the school-boys; we all bowed to Butler when we entered; my brother's hands were then by his side; noticed that he held his hat in his left hand and gesticulated with his right after we entered; when Butler sprang forward, think it was his left hand that he seized Matt. with, and the right that he struck him with; do not feel quite positive in regard to this, as I was considerably excited; know that he struck him twice; may have struck him three times or even four; my brother put his hat on when he told Butler he must hear his opinion of him; and when Butler seized and struck him, he then first put his hand in his pocket; did not know that my brother had pistols until I saw him take that from his pocket; have carried arms since I was fourteen years of age; having always associated with men older than myself, have done so, fearing I might get into a difficulty sometimes, and need them to defend myself.

*Mr. Carpenter.* You say your brother told Butler he *must* have an apology? He said so; but he did not put the peculiar emphasis on the word "must" that you do.

*Mr. Carpenter.* Where were your brother's hands as he entered? By his side.

*Mr. Carpenter.* On which side

of him were you? Behind him.

*Mr. Carpenter.* Was the door shut? I do not remember.

*Mr. Carpenter.* If you were behind him how is it that you do not know whether the door was closed or not? Because my brother William came in behind me.

Another lot of witnesses—*Dr. S. D. Gross, Dr. Lewis L. Rogers, Daniel McAllister, Coleman Darriel, Major Davis Earnael,*

*Robert P. Rankin, James Lithgold, John Stenwall, James Speed, Mayor of Louisville, Mrs. J. Oldham, Mrs. Gwinn, William Logan, Capt. J. W. Brannon, Postmaster of Louisville, Richard Anderson, Col. Alex. P. Churchill, Alexander Walker,* editor of the *New Orleans Delta*, and others testified to the same effect as those called before,<sup>19</sup> as to the prisoner's character, disposition and state of health.

### THE COMMONWEALTH IN REBUTTAL.

*James S. Pirtle* (recalled.) Saw Mr. Gudgel when he testified here yesterday; do not remember him as being the man who came to the school-house after the occurrence; there were two men came; do not recognize him as one of them; don't think I ever told Judt that Butler struck Ward.

*Joseph Benedict.* Saw Mr. Gudgel here yesterday; I am not the boy he met on the street, crying after the occurrence; had seen Gudgel before I saw him here yesterday.

*George Sullivan.* On the day of this difficulty, had a conversation with J. M. Barlow. He said to Mays and me and others in the shop, it was the most aggravated case he had ever heard of, that if Matt. Ward was not punished for this, there was no use in trying a man in Kentucky for murder; he proposed to go down and take out Matt. and hang him; suppose he was jesting, he continued to talk in the same way about the matter; a while after, I noticed he seemed to change, after he said he had been to see Mr. Robert J. Ward;

he said he asked Mr. W. if he wanted to find a man who could swear that Butler struck Ward first; that Mr. Ward jumped up and took him by the hand, and said it was just what they wanted, but where was the man? that he replied: "I am the man," that, he told Mr. W. he was a poor man, and could not afford to lose time to attend the trial; that Mr. W. replied he should lose nothing by it, but should be well repaid; that he (Barlow) replied to this—"I don't want you to talk any more in that way"; have heard Barlow say he would bet on the defendant being cleared; has told me that he had played cards in jail with defendant; said that when he had told Mr. Ward what he could testify to, Mr. W. invited him to wait until he called the family down, and be introduced to them, but he declined.

*Crossed-examined.* Have talked a good deal about what I could prove, with different persons; think I first told Mr. Carpenter that while we sat together in the Crystal Palace, Barlow said: "I'll just bet they

<sup>19</sup> See *ante*, p. 91.

clear him"; it is very common, when people in our shop wish to affirm a fact or opinion, to say they will bet on it; was joking when I assented to the proposition to take out defendant and hang him; regarded it as a jest.

*Uriah Mays.* Barlow gave me an account of his visit to Mr. Ward's house, just as Sullivan has related it.

*Dr. David Thomson* (recalled.) Have no recollection of meeting Barlow, on the day of the occurrence, either in the street or in Colonel Harney's house; did not carry my case of instruments in my hand on the way there, they were in my side-pocket; never carry them in my hand; am sure he did not suggest to me, to take off his clothes; there was no conversation with Prof. Butler, after I entered the room, until I asked him what the position of the parties was, during the affray; he said they were clinched; no other person interrogated Butler at that time but myself; do not think Barlow was in the room.

*Cross-examined.* Sent out after some brandy, soon after I reached the house; Prof. Butler had a dickey and two shirts on; he drank some of the brandy; he had on a black cloth coat, with a waist to it, and pockets at the side; he wore a black silk or satin neck-handkerchief; I

tore open one of his shirts, and started the other with my scissors, before I tore it.

*Mr. Wolfe.* You are a member of the Presbyterian church, I believe, Dr. Thomson? I am, have been for ten years.

*Mr. Wolfe.* Are you not a teacher in the Sabbath school? I am, sir.

*Mr. Wolfe.* It is usual for members of the church to carry arms? I do not know; am not aware of any regulation in the church in regard to it.

*Mr. Wolfe.* What have you done with those pistols you had on your person yesterday?

The COURT. You are at liberty to answer the question or not, as you please.

*Dr. Thomson.* I decline answering it unless I am under legal obligation to do so.

*Edward Knight* (recalled.) If Barlow assisted in undressing Butler, or was there at all, I did not see him; (saw another gentleman there, who I think was a Mr. Rupeus, it was not Barlow, I am sure), either the doctor or this Mr. Rupeus first suggested to take off Butler's coat.

*Cross-examined.* Do not know precisely where Mr. Rupeus lives, but he lives in Louisville; there were over half a dozen persons in the room at the time; Dr. Thomson took off Butler's coat, with my assistance.

#### THE DEFENSE AGAIN.

*James S. Speed and L. P. Crenshaw* testified to the good character and reputation of Barlow for truth and veracity.

*Robert J. Ward* (recalled.) When Barlow called to see me, he said he had been told it was

important to the issue of the trial of my son, to ascertain if there was a witness who could prove that, in this unfortunate affair, Butler had struck him first; told him it was a very material point; he said he was one

who could do it, and then went on to detail to me the same circumstances he has related here; told me he was influenced simply by a sense of justice; asked Mr. Barlow's name and business, how long he had resided in Louisville, etc.; asked him to meet me at

Mr. Wolfe's office the next morning, he seemed reluctant, as his business was pressing; offered to pay him for the day's work, but he refused to receive it; never offered or intimated any inducement to him to testify; never told him he should be doubly repaid.

## THE SPEECHES TO THE JURY.

MR. CARPENTER, FOR THE COMMONWEALTH.

*April 22.*

Gentlemen of the Jury: I approach the opening argument in this important case, under embarrassing circumstances. I am a stranger in Hardin County. Not an eye in the jury box, or in the multitude here assembled beams on me the light of recognition; not a face known to me; not a familiar countenance.

Against me are arrayed counsel eminent for their learning, talents, and genius, known and appreciated, not only in this county, but throughout the State and the Union. The position of prosecutor is one I have never occupied before by employment, and one I do not covet, but I shrink not from it, when the cause of justice and the welfare of the community demand it. The true calling of the jurist is to mete out exact justice to all, and it is difficult to discern the justness of the proposition that an attorney may be retained to defend any man, however criminal, but must, in no case, prosecute one, however guilty. If we look to the practice of the most eminent members of the Bar, including such names as Webster, Clay, and Wright, we find they pursued a very different course. I engaged in this cause from a high sense of duty to the public, and a desire to lend the aid of my feeble talents to bring down upon the prisoner (if guilty) the merited punishment of his great crime; and I gladly share whatever odium there may be attached to those assisting in this prosecution. I have taken no steps in this case that were not imperatively demanded by my convictions of duty. Because engaged in it, I do not feel called upon to

ask for a conviction unwarranted by the law and the facts. Weak as I am, I appear before you as the advocate of a million of the people of this Commonwealth, and ask you to hear me for my cause. Man is ephemeral, truth is eternal; no matter who speaks it, it is truth still, ever enduring and immortal as its author. Let my remarks have no effect upon you except so far as they accord with the law and the testimony; and if consistent with these you can acquit the prisoner, it will give me unfeigned pleasure.

Allusions have been made to the great, and almost unparalleled excitement existing in the city of Louisville, in regard to this occurrence. It has been said that certain newspapers are responsible for all this unusual agitation. I have as yet heard no one pretend to deny the truth of the facts charged, and if nothing but a simple narration of the facts as they occurred, has been given, why so much complaint? On as bright a day as dawned in the year 1853, in the face of seventy thousand people, without any just provocation or cause, the prisoner entered the house of the deceased, insulted and killed him. Is it remarkable that excitement followed an act of this character? Do gentlemen expect murder to stalk abroad at noon-day, and a free press and a free people to be silent? Is not this a case well calculated to arouse the just indignation of an intelligent community?

But however natural and proper those ebullitions of the public feeling, then and there, you, gentlemen, are not to give the slightest weight to them, either as tending to show the guilt of the prisoner, or as diverting your minds from the proper issue. I beseech you, gentlemen, as you regard the solemn oath you have taken, the majesty of the law, the well being of mankind and humanity, to lay aside all prejudice—banish from your minds every extraneous influence, forget everything seen and heard before you entered your box, and with minds as free from the stain of previous opinion as virgin paper, receive impressions from the facts alone. Justice, when she holds the balances, turns her head to avoid seeing who is in either scale; so you, gentlemen, must turn

from all but facts, remembering you are in the Holy of Holies, the sanctuary of justice. You have a great and painful duty to perform, and for its performance you are responsible to the law, your country, and your God.

This is a most extraordinary trial. You and I have never known such an one before. It is extraordinary that such a man so formed to be loved, admired, and cherished, so mild and unassuming in his manners, so averse to combat and bloodshed, so intellectually great, should have found any human being malicious enough to take his life. It is most extraordinary that such a man as the prisoner, should have killed his former friend and family benefactor. It is extraordinary in the manner in which the defense has been conducted—the number and character of the counsel—the great multitude of witnesses—some being brought from the Halls of Congress and the Cabinet, to testify to the former good character of the prisoner, a fact, which if true, an honest mechanic, or his father's gardener, all unknown to fame as they are, would have proved more satisfactorily—for men are best known by their treatment of inferiors.

Doubts have been thrown upon everything; and you would almost believe from the skeptical manner in which the counsel have interrogated witnesses, that the lamented Butler was yet alive, and that this was some tragedy enacted for the benefit of the audience; and from the querulous and peevish tone of complaint indulged in, you would suppose that some of the counsel for the State had committed some great crime, and were on trial instead of the prisoner. All that wealth, talent, and influence could do to acquit the prisoner has been done, and it is a source of gratification that it is so; for if the facts now call "trumpet tongued" for conviction, and you respond like honest men to that call, you will be sustained by the reflection that every facility has been afforded the prisoner to prove his innocence.

In addition to what has been done by the friends of the accused, American law always benignant and merciful, as expounded on this trial by a most kind-hearted Judge, has

scope the belts and rings of old planets and newly discovered ones,—resolved the nebula into splendid systems of glorious suns with their circles of flame: had you listened to the “small, still voice” of the sighing zephyr, beheld the opening flower, the tinted shell, the butterfly’s wing, the majestic mountain; had you stood upon the brink of the mighty Mississippi, and watched its liquid wave roll ever on, towards old ocean, no mean emblem of eternal power! Or gazed with wonder and awe upon the great falls of Niagara gliding over the rapids, under the rainbows ever singing God, God, God. The land and ocean, storm and tempest, all proclaim that “The whole earth is full of his glory.” If you look within your own minds you find still clearer manifestations of almighty wisdom and power than elsewhere in the universe. The mind so strong and yet so weak, so intelligent, comprehensive, and grasping, with all its mysterious operations, plunging now into the bowels of earth, now exploring and analyzing its surface; then leaving it, and holding converse with the heavens; listening to the “music of the spheres,” again descending to the abodes of men, tracing effect to cause, following all the meanderings of passion and will, exclaims in the fullness of its admiration, “There is a God, for I am fearfully and wonderfully made.” It cannot be denied that the evidence is full, ample, and complete, and no reasonable doubt can hover around the mind.

With these general principles to govern us in our investigation, let us examine the law as applicable to this case.

The authorities will show:

1. The malice necessary to constitute the crime of murder is not confined to the intention to take the life of the deceased, but includes an intent to do any unlawful act, which may probably end in depriving the party of life.
2. If an action unlawful in itself be done with the intention of mischief, and death ensue, it is murder.
3. When death issues from sudden passion upon reasonable provocation, it is manslaughter. If without such provocation, or if the blood has time to cool, it is murder.
4. When the provocation is



sought by the prisoner it cannot furnish any defense against the charge of murder. 5. If a prisoner uses a weapon that was likely as used to produce death, the law presumes he used it with the intention of killing.

These propositions contain the law, gentlemen, as laid down by the most eminent jurists of this country and Great Britain. What are the facts? The witnesses for the prosecution, on motion of the prisoner, were separated, neither hearing the testimony of the other. The facts as to Ward's visit to the house of the deceased, and the murder, are proved by young men from eleven to nineteen years of age, all of whom reside in Louisville, and are members of the most respectable families in the city. They are all unimpeached, and unimpeachable. Though separated, they have all, without exception, related the same facts, differing only as their relative position to the parties in the school room enabled them to see and hear, more or less of what transpired.

(*Mr. Carpenter* here exhibited the diagram of the school room, showing the relative position of each witness, as detailed in the examination.)

The youthful mind is fresh and pure, averse to falsehood and dissimulation, and always disposed to speak the truth. The pure waters of truthfulness and sincerity, well up, naturally, from the untroubled fountains of their hearts. How unfortunate, that men so soon forget these early impressions, and pass through life in masquerade. Of all testimony, that of these young men, trained up at the feet of their deceased teacher, who loved and adored truth and hated falsehood, is the most reliable. The facts, as related by them, all corroborating each, and each in turn strengthening all, are unanswerable. It is as though an angel had dipped his pencil in a beam of light issuing from the eternal Throne, and cast this murder upon the canvas with such startling correctness, that while you gaze, you know the prisoner set for the picture. Efforts were made by the learned counsel to impeach, indirectly, these young men, by asking them, did you not tell Dr. Caspari and others that Butler struck Ward first?



But when the Doctor, and others referred to, came upon the stand, a contradiction was not even attempted.

If the counsel desired to impeach the witnesses, why did they not call respectable citizens from Louisville? This would have been fair, open, manly.

These young men prove, that about half past nine o'clock, a. m., on the second day of November, 1853, a servant of Robert J. Ward, Sr., came to the school room of Prof. Butler after Victor Ward, a young brother of the prisoner, and his books. They also prove that William Ward, the brother who had been moderately chastised the day before in school, for telling a falsehood, came in about a half hour later, walked up the aisle, took his accustomed seat, and turned round and walked towards the door. It is further proved, that the prisoner and Robert J. Ward, Jr., then entered, and inquired for Prof. Butler, who was at that time absent from the main building, hearing a class in his recitation room; and that the prisoner on his entrance, seemed excited, had his hand in his pocket during the entire conversation which ensued, and kept it there until he drew forth the pistol and fired.

It is proved that in answer to the previous inquiry, that Minor Pope went to the recitation room, and called Prof. Butler, who came out, and with all his usual urbanity, said pleasantly, "Good morning, Mr. Ward;" and that the prisoner's reply was stiff and scornful, and that he then in angry manner, commenced gesticulating with his left hand, and said in a loud tone, "I have a matter to settle with you;" that Prof. Butler then politely invited him to walk into his recitation room, and he would explain everything to his entire satisfaction; that the prisoner refused, saying that he did not come for an explanation, that that was the place to settle it; that the prisoner then asked the deceased which was the worst, the contemptible little pup who begged chestnuts and then lied about them, or his brother who gave them to him; that the deceased then remarked, he could not answer unless first allowed to explain, and that the prisoner again refused

to hear an explanation, and asked why he called his brother a liar; and without waiting for a reply, said to the deceased, "You are a damned liar and scoundrel," and followed the offensive words by a blow with his left hand; that Prof. Butler then caught hold of the collar of the prisoner with his right hand and attempted to seize Ward's right with his left to prevent his using weapons; and that the prisoner drew the pistol, pressing it so closely against the breast of the deceased that it remained for some time in the orifice caused by its discharge, and was taken from thence and thrown upon the floor by the deceased himself; that Prof. Butler then staggered forward towards the recitation room of Mr. Sturgus and fell, saying, "I'm killed! my poor wife and child."

It was also proved, that during the whole conversation, the prisoner stood but a few feet from the door, between it and the deceased, which was open, enabling him to retreat at any time, if he desired. But there is another witness, who, from the cold grave, gives an account of the horrible transaction. That his statements were made under the full belief that he was a dying man, is proved by Mrs. Butler, who with a heroism worthy of a Spartan wife and mother, testified in regard to this subject, while it wrung blood from her young heart; Prof. Butler, standing on the very verge of time, the cold waters of the river of death even then laving his feet; at that solemn hour, when the memory regains all its former losses, and the mind-sky becomes clear, illumined by eternal light, declared that the prisoner insulted, cursed and struck him before he gave him a single blow.

It is thus clearly shown that the prisoner went to the school room, violated all the rules of common decency, insulted and killed Prof. Butler without the slightest legal provocation. Look at the cause. His brother, William Ward, had been punished for a violation, not only of the rules of the school, but of morality and honesty. There was no reason why he should not be punished. On the contrary, it was the duty of his teacher to correct him, and had he failed, he would have been highly culpable. But the first cause of this mur-

der lies far back of the punishment inflicted. It is to be found in the education of the prisoner. Belonging to a wealthy, aristocratic and fashionable family, he had been taught that he and his brothers were formed of better clay than ordinary men, had gentle blood in their veins, were not answerable to the same laws, social or municipal. Family and wealth are to be highly prized, as conferring many advantages; chiefly the opportunity of relieving want, alleviating distress, comforting the afflicted, assisting merit, promoting paternal regard and brotherly kindness. It is for purposes like these they are desirable objects. When they become petty tyrants to inferiors, engines of gross oppression, they only serve with honest and independent people, to show more conspicuously the meanness of their possessor. The prisoner had evidently taken a different view of the matter; his brother had been whipped, and as under the Mosaic law there could be no remission of sins without the shedding of blood, so it required, in his estimation, the life-blood of the deceased to wash away a Ward's disgrace. How many crimes are the offspring of those monster parents, Vanity and Selfishness. Wm. Ward had the day before told the prisoner of the occurrences at school, and with his breast rankling with hate, mortified vanity and revenge, he prepares himself for the fatal visit by going to the gun store of Dickson & Gilmore, half or three-quarters of a mile out of his direct road, and first buying a single self-cocking pistol, and as he was about leaving purchased another, and requiring them both to be loaded, ready for use, putting them in his pocket and starting on his mission of death. These pistols were purchased between nine and ten o'clock; the prisoner arrived at the school room a few minutes after ten. Why did he go from his father's house down for the pistols, instead of going directly to Prof. Butler's, which was but a square, unless he expected a difficulty, and desired to use the pistols as he did use them? What other reason can be given for his conduct? Nothing explains intentions like acts; they reveal the secret motives of the heart. It is also proved

by Mrs. Harney, whose lucid manner of delivery and readiness of perception show her quite competent to judge, that when on his way from the gun store, he looked resolute, excited and decided. The question then recurs, with what intention did the prisoner go to see Prof. Butler? For an explanation? Certainly not; for he remarked while there, he did not come for explanations. If the object of his visit was pacific, why arm himself? Why send for the youngest brother and his books? Why send William back? Or why take Robert with him? He bought the pair of pistols so as to have one to intimidate the boys of the school, if they should attempt to interpose, as is shown by his conduct, as proved after the shooting, in drawing out his other pistol and pointing it at the boys, in a bullying, threatening manner. Perhaps if young Pirtle, a lad of eleven years old, had attempted any assistance, he would have shot him. Will it be contended that the prisoner, knowing as he did that Prof. Butler was unarmed, averse to quarrel, peaceable and kind in a remarkable degree, was so cowardly as to be afraid to talk for a few moments, without his hand resting upon his pistol? I will not do him such gross injustice. He held his pistol firmly in his grasp, using at the time coarse and abusive language, such as he knew would be most likely to produce a blow, on purpose to bring about the difficulty, and thus have a pretext to kill, if Prof. Butler refused to submit to the degradation heaped upon him in the presence of his pupils. He used language that he well knew no man in Kentucky could submit to without loss of character, and if he refused to submit, he was to be shot down like a beast. But it seems that the prisoner defends himself upon the ground that the deceased struck him! How arrogant and self-conceited! What was there about his person so immaculate, as to exempt him from a blow, in return for his insulting language, to a man who, in all the aspects of human greatness and goodness, was as far above him as the heavens are above the earth? Had the deceased forcibly ejected him from his premises, and punished him, it would have been the very best treatment

he deserved. It was quite evident from the low, vile language employed, that all the baser passions of his nature had been aroused. "A man's house is his castle," and the law throws around it the mantle of its protection in a special and unusual degree, and this case illustrates the reason of this especial legal solicitude. The deceased, without ever dreaming of any difficulty, was quietly instructing his school, unarmed and unprepared. What an example for those young men? What a precedent for them? and what a damning and outrageous precedent would be a verdict of acquittal? If such a man, for such a crime, is to go unwhipped of justice, burn your Constitution and Statute Laws, hurl down the Judge from his bench, go forth forever from a profaned and corrupt jury box, and let the angel of justice proclaim from her temple, as did the angel of the Holy Sanctuary of Israel, I will arise and go home, to return no more; and let all traces of civilization vanish like a shadow, and Kentucky become what she was when the primeval forests covered her, the dark and bloody ground. If Ward had a right to kill the deceased, for the injury received, most assuredly the brothers of the deceased would have the right to kill him, and where would it end? Butler refused to make an apology or explanation upon the demand of the prisoner, and did right; whatever might have been his error, he would have shown himself quite unworthy of his high position and character, had he stooped to comply with such a bullying requisition. He chose wisely to preserve his dignity and honor, and lose his life; for of what value is it without them?

It is in proof, that the rules of the school prescribed a recess of five minutes at the expiration of every hour, and at half past ten, a recess of half an hour. The prisoner went there between the ten and half past ten recess, so as to find the boys engaged at their desks, and to enable him to do his dark work without any interruption from them; another fact, which, if taken separately, would be far from conclusive, but standing in the relation it does to the other facts, points unerringly to malice aforethought. If it had been recess,

and the large boys all at liberty to stand around their teacher, his designs might have been thwarted, or in the scuffle, some of the young men belonging to families moving in the same social circle with the Wards might have been killed, and that would have been, in his estimation, a very different thing from killing a mere school teacher. But it is not necessary to constitute the crime that he should have intended to kill him when he went there; and the length of time intervening between the formation of that determination is altogether immaterial. It is enough that he went there to degrade; that he refused all explanations and demanded apologies which he well knew would not, could not, and ought not to be given.

Here, gentlemen, is a chain of evidence as unbroken as human testimony can make; "not a tie will break, not a link will start," a bulwark sufficient to resist the ingenuity of the whole phalanx of the defense; a mighty rock, against whose base the waves of the ocean of eloquence will dash, only to fall back defeated, as if in the very weakness of weeping tears. How does the defense try to extricate itself from this circle of truthful flame that surrounds it. By introducing many witnesses who are persons of distinction, and it is expected their very presence will act like a charm upon you—by introducing Robert J. Ward, Jr., who was an accomplice in this work of death, and by refusing to introduce young William Ward, who went with them, and therefore knew more of their intentions than any one else. William Ward was sworn as a witness, why was he not examined? He went from his father's to the school house with the prisoner, heard his conversation, knew the object and purpose of his visit better than any one disinterested, and the true intentions of the prisoner would have been disclosed. But they did not introduce him, because they dare not, as he would doubtless have proved the guilty intention. As much is often revealed by what a party withholds as what is advanced. Half the truth is invariably a falsehood. If William's evidence would have been favorable to the prisoner, would the defense have overlooked it? They have ransacked the Union, for a Secre-

tary of the Treasury, members of Congress, Judges, etc., to prove the unimportant point in this case of good character, and now, when he is permitted to prove his own declarations on the way, he is afraid to do so. The inference is irresistible, when it is remembered that from what had been told William, he looked around on taking his seat to the door as though he expected a difficulty.

The defense then introduced the man Barlow. It is always unpleasant to attack any one when it is known he cannot defend himself, but he has voluntarily placed himself in this most unenviable position; and justice to the memory of the deceased, and the history of this case require that he should be held up to this jury and the world, as an object of withering scorn. It is not necessary to charge Robert J. Ward with bribing this villain to account for his perjury, although it is highly probable that he expected to be paid for his infamy. There are men in society, or rather in the sewers of society, who reptile-like move and live in its excressences and slime, who think they have achieved the very highest enjoyment, known to their low groveling hearts, if they can obtain a single smile from the rich and powerful, and who only breathe freely when they inhale the air of toadyism.

This witness belongs to that class; he is content to be a tool and a villain to prejudice his soul, and sell heaven itself, for the sake of saying he has been at the house of Robert J. Ward, a millionaire—been invited into the parlor and kindly treated. He is decidedly of a lower grade of animal than the ordinary villain who receives so much money for a given amount of false swearing. He testifies that on his return from Gay street, that the first he heard of the shooting, some small boys gave him the information, that he then passed down Chestnut street to his carpenter's shop, left some tools and returned, overtaking Dr. Thomson, who had been called to Col. Harney's, talked with the doctor, who had his case of instruments in his left hand, and went with him to see Professor Butler; that he suggested the necessity of taking off portions of the deceased's clothes, and then asked him



how the difficulty happened; that Professor Butler told him that the prisoner came to the house and insulted him, and he then struck Ward, and immediately received the shot.

On the cross-examination he was forced to admit that he related the facts to Mays and Sullivan on the day of the killing, and told them that it was the most aggravated murder he ever heard of—that the Wards would get what they deserved—that they had been getting down for some time, and could not get much lower—and if Matt. was not hung there was no use in talking about justice in Kentucky—that he offered to be one of a party to go to the jail and take him out and hang him without a trial. It was proved that he continued in this mood until about the time he went to Ward's house. All at once he becomes suddenly changed, and thinks the prisoner persecuted, sympathizes with the afflicted parents, and proclaims the joyful tidings that he will prove him innocent. This is unaccountable upon any other supposition than his determination to commit perjury.

What, this man so vindictive and malicious towards the family, so suddenly become their well-wisher and friend! Had Ward known of his previous conduct, would he not as an honorable man have spurned and driven him from his house? Barlow stated that he had been in the jail and played cards with Mrs. M. F. Ward against the prisoner and Robert J. Ward, Jr. Mr. Prentice testified that the prisoner was always very reserved with gentlemen, seeking almost exclusively the society of ladies; and it is very singular that he should thus cast off all his antipathies to male companionship, and introduce his young and interesting wife to a low bred, illiterate, and unprincipled sycophant. The prisoner is proved to be a man of intelligence, and, doubtless, knows a villain's face, and cultivated the acquaintance of this man to subserve his own purposes. Then it is proved he offered to bet on the result of this trial, and perhaps did, and that he had said Ward promised to remunerate him amply for coming down to this trial. Did you not observe, gentlemen, his conscience-stricken manner when he was asked if he had



Is he true and every man a liar? I am sorry to be obliged thus to characterize the witness, but duty requires it. Again, he did not observe which hand Butler struck with. Here it was convenient to forget. And then he says Ward put on his hat, just as he gave the lie to Butler, and in this he is corroborated by the other boys. One thing he does remember, that Ward gesticulated with his right hand. Of course he would not forget so important an item.

At the bedside of Butler were Drs. Thomson, Caldwell and Yandell. Thomson was there first, and heard portions of Butler's statements before Caldwell and Yandell arrived. He asked the question, and was in a better position than the others to hear the answer. Dr. Caldwell remembers Butler said that he did not see who shot him. Dr. Thomson says so. Caldwell understood they were engaged at the time; Thomson's testimony imports the same. If anything was required to confirm Thomson it is furnished by the defense itself. Yandell says Butler raised his hand to show Ward's motion, but does not know whether he meant by that that Ward did or was about to strike, but he supposes Butler did strike first. Now from the proof, if Butler had not been shot, and this was an action of trespass, brought by Ward against him for an assault, could he recover damages? But Ward was the trespasser; he was the wrongdoer. The testimony of Thomson, in this respect, is confirmed by Caldwell and Yandell, substantially. As respects the wound, there is no material difference in the testimony. From the suggestion about raising the arm, an attempt has been made to show the arm was in a striking position; but when raised in that way, the probe did not follow the ball. The position of the muscles, as shown by the wound, shows that Butler was grasping at the right hand of Ward, as is proved at the time.

Their next witness is Mr. Allen, of Mississippi, introduced to impeach these boys. There were a thousand men in Louisville who knew these boys, and could testify to their character. Yet it is a singular fact, that of all the witnesses summoned by the defense from Louisville, not one question is

asked them about their veracity; but an unknown man from Mississippi, confirmed by only one man, and he equally unknown, and by him only in some particulars, is called for that purpose. And now, must all these young men of Louisville be swept down,—must their reputations be blasted, that this prisoner may live and flourish, and upon such testimony? But they disavow such an attempt. They have manifested the willingness, but are afraid to strike the blow. They do it by inuendo. But suppose you believe all Allen says. He does not identify a single boy, as saying anything there, contradicting his testimony here. He says he saw young Worthington there, shook hands with him, and asked about the matter, and several boys answered several questions, and to some of their answers Worthington nodded assent; to which, the witness does not know. There is no evidence that a single boy who answered Mr. Allen has been on the stand as a witness.

Mr. Gudgel is next introduced, and how do these witnesses confirm each other? Two men walking together ought to agree. Allen says the boy said that Ward cursed Butler, and Butler struck him, and Ward shot. Gudgel says that the boys said that Ward came for an apology, and Butler ordered him out of the house; Ward refused to go, and Butler undertook to put him out, and Ward shot him. They disagree with each other more than with the boys. He testifies, too, that some of the boys said Butler knocked Ward down. Allen heard no such thing, young Robert Ward swore there was no such thing, all the boys testified the same, and there was no motive for the boys to say so, and therefore it was not said. Gudgel is contradicted by this fact, and also fails in his attempt to identify Benedict, after boasting of his memory of countenances.

Hershbell is brought in to testify about the music box, and show that Ward was engaged in making arrangements for a trip south. Admit that the witness sought the conversation, still the statements are none the less Ward's, and grant their truth they only confirm his guilt. To say nothing

of the discrepancy of the statements,—some that he was going to Arkansas, and some to Mississippi,—the design might be to commit the crime, and then, because he was a Ward, go where he pleased. But it was probably true that he meant to go, that such was his plan, and that he was making preparations, and had been for weeks; but do you suppose he would be stupid enough to go and tell that he expected a difficulty with Butler, and therefore was not going to Arkansas? This is simply ridiculous. It was the time of year at which he usually went south, and he would not neglect preparations on account of his anticipated difficulty with Butler.

That Butler struck Ward is attempted to be proved by the red spot on Ward's face. It was so slight, that George D. Prentice and others did not see it until Ward mentioned it. Was such a wound a sufficient provocation for the killing? Grant that there was a spot, could not a man that could murder produce such a spot on his face? There were no marks or mark of blows elsewhere. If there had been, they would be proved.

Now we come to the testimony of the father himself. There is no doubt of its truth. Matt. made the statements. But they are the prisoner's statements still, made after his preparations were completed, and he was ready to go. Might they not all be made with a view to introduce them as evidence? If an explanation was all that was wanted, he would not have objected to his father's going. The true reason was he expected a difficulty, was prepared for it, and sought it. His statement that Butler was a gentleman, and there would be no difficulty, was all a ruse. Why all this preparation? why tell Bob not to interfere unless Butler and Sturgus both attacked him? Because he expected a fight, and could manage one easily. If an explanation or apology was the object of the visit, the prisoner had no right to go. Robert J. Ward was the father, had placed the boy in school, and Prof. Butler was responsible to him alone, and not to the prisoner. Here, then, you have, in the fact of the refusal of prisoner to allow his father to make the visit, and the reasons he gave

why he should go, another proof of the wilful, premeditated and malicious character of this murder.

Mrs. R. J. Ward's testimony is to the same effect. Her statements about what her son said of the severity of the whipping, is to be taken only as his expressions, not as any proof that such was the fact. The strongest point that can be taken in his behalf is, that they believed the statement. All the others say they expected no difficulty, but the watchful eye of a mother penetrated through every disguise, and she expected a difficulty, else why send Robert? She knew her son, his temper, his family pride, and therefore she sends Robert, who, she knows, is always armed. His mother notices his disguised excitement, and says, "Be calm"; and he answers, "I am calm,"—showing his determination to do the deed.

Col. Hodge, and others, are next introduced to prove the custom of having pistols loaded when purchased. One witness testifies that pistols are loaded when purchased, if the request is made. The prisoner requested his loaded, showing that he meant to use them, and he did most efficiently.

The Marshal of Louisville, L. B. White, is next examined. He hears that a man has been shot, goes to arrest Ward, meets the father, tells him his object, and then goes to see how Butler is,—thus giving Ward an opportunity to escape,—and says that he could certainly have escaped in that time. This may be the efficiency of the Louisville police. But he knew well there was no escape from the people of Louisville. They were on the alert, and that was impossible; and if he could, he would not have attempted it. He would sooner run the risk of this trial, with all its array of counsel, and witnesses, and money, than be an outcast on the face of the earth, ever fleeing from the pursuit of justice, with no hope of rest or refuge.

One fact developed by White's testimony is in perfect keeping with the heartlessness of the whole case. Robert came to the door, when White went to arrest the prisoner, and "quizzically said, Matt. has vamosed." There is a volume in that

expression. It shows his estimation of the value of human life. He has just heard the dying exclamation, "My poor wife, my poor child," and he is now jesting about it! He is the young man one would expect to carry a bowie-knife, and use it too.

But a police officer is brought here to testify that Ward never made an attempt to escape from jail. Now I have heard that when a prisoner wanted to escape, he told the police of it, and secured their co-operation, but I never believed it. If he regards it as a compliment to be thus made the depository of all their intentions, I cannot help it; but I do not think Ward would have told White, even if he did design escaping. No, he would never have told him, whatever he might have told to the turnkey, with whom he and Barlow so innocently played cards.

The last proof on the part of the defense is that respecting the former good character of the prisoner. In a crime of an atrocious nature, when men are actuated by different motives from those generally governing mankind, a good character is no palliation, especially when the crime is positively proved. It is only when doubts exist in regard to the facts, that character may be brought in to decide the doubt.

This is not the first time that a man of good character has killed another. The law is made for such men as well as others, and he that offends in one point, is guilty of a violation of the whole law. No matter what position that one has previously occupied, if guilty he must fall. If the prisoner had killed a dozen men before, it could not be produced as testimony against him on this trial; and if guilty of this one sin alone, his former purity is no justification. Instances have occurred in this State, where men, charged with murder, have proved, by a large number of witnesses of every variety of position, previous good character, and this was argued in their defense.

The case of Dr. Webster, who killed Parkman,<sup>20</sup> is too recent to need more than a brief notice. Webster had sustained

<sup>20</sup> See 4 Am. St. Tr.

a character above reproach, was the associate of the most intellectual and refined men of Boston, had devoted his life to scientific pursuits, had shut himself up in the great temple of science, a constant worshiper at her shrine. Yet he was found guilty; and, to the everlasting credit of Massachusetts be it said, the law was magnified.

If men like these were thus punished, what shall be done with the prisoner? The time was when murder did not defy public opinion by holding its revels in the blaze of day, but sought the concealment of night. Webster decoyed and murdered Parkman in secret; others have followed and killed unsuspecting travelers, unseen by human eye. But the prisoner, on account of his position, scorns all such opportunities, walks along a public street, stalks into a public school, and shoots down the teacher, defying public opinion as well as law. And, now, every doubt being swept away, the proof positive and abundant, can character avail to even reduce this offense to manslaughter?

But, it is said, this as an unusual case, and there must have been great provocation. So is every murder an unusual case. It has not yet taken a place among common crimes. The wonder is, that any man can commit the deed. If the bare thought intrudes itself into my heart, the natural exclamation is, "Get behind me, Satan." Yet unusual as the crime is, it is not so much as it ought to be. You can hardly take up a newspaper that does not contain an account of some "horrible murder." And such notices will become more frequent, unless juries do their duty. But, grant that this is an unusual case, is it more so than the first murder of which we have any account? What provocation had the meek and quiet shepherd offered Cain? None; save the spotless purity of his character, which by its moral light revealed to his own fierce and restless spirit its guilt. The facts proved by the witnesses as to character, show the prisoner far more guilty than ordinary criminals. Born to wealth and high position in society; never knowing the wants, and inconveniences, and temptations attendant upon poverty; with every opportunity

to inform his mind, and study the relations he sustained to the human family, that this his native land could afford; enlarging his views and storing his mind by foreign travel, into countries where the associations that cluster around their very names, teach lessons of "Peace on Earth and good will to men." Knowing his victim as his father's friend and favorite; knowing his defenseless condition; how could aught but the Demon of Murder actuate the prisoner? Had he been poor, lone and forsaken, enduring for long years the coldness, neglect, taunts and scorn of the rich and the proud, till his soul, by such constant irritation, became infected with the murderous poison—charity might have found, in the cruel tyranny and scorn of the world, something in mitigation of the crime. But, stript of even this poor pretext, he stands before you in all the naked deformity of a wilful murder. But you are asked for mercy. It is only the merciful who can claim the boon; and, if it is to be given, it belongs to the Executive Department of the Government, not the Judicial. What is mercy but the grave? Can you tear from his heart remorse that, like a worm, makes its hourly meals from its best blood? Can you blot from his memory all traces of his horrible deed? There is no rest for him but in repentance and the grave. He is the murderer of one of the most estimable of men,—one of those who seem sent by heaven for models in all the relations of life; one whose conscience was clean; whose conduct with all was "without fear and without reproach;" whose heart, in its kindliness and child-like simplicity, was ever fresh and young, resisting alike the plow of time and the seductive vices of the world. For such a deed there can be no cessation of torment. The prisoner may again travel abroad, but a guilty conscience will be his constant companion. He may regain health, and mingle in the conflict of life, but he will find there is no balm for the wounded and guilty heart. He may seek the field of battle and glory, but above the din of arms, the roaring of cannon, the shrieks of the dying and groans of the wounded, conscience shall thunder in his ears "my wife—my poor child!" If he join his boon companions,

and seek in the foaming bowl to drown all memory of the past, he shall find the sparkling wine changed into the blood of his victim. If he leaves the land of his birth and his crime, and finds a home upon the ocean, in every white cap he shall behold a winding sheet; and in every breaking surge hear a death-groan. Let him revisit fair, beautiful, and lovely Italy—the land of bright skies, soft music, fragrant flowers, and splendid paintings, and the blue vault above will only remind him of the domestic heaven he has destroyed; the music, of the sweet voice he has hushed; the flowers of the dear little blossom he has deprived of its parent stem; and the paintings shall be but so many portraits of his guilt. Wherever he may roam—by land or sea, he shall behold a thousand multiplied images of the corpse of the deceased, reflected from the mirror of his own guilty imagination.

Conscience has bound the very corpse to the prisoner with the deathless chain of memory, and when he lies down, it shall be the last watcher hovering around his couch, seeming to hurry his spirit to its account and reward. Gentlemen, he may escape the law; you may acquit; but he cannot escape this unchanging presence. Heaven has wisely ordained that when all other punishment fails for a crime like this, conscience, with her ten thousand scorpion stings, shall lash and lacerate the offender until, in all the dreadful agony of his soul, he shall exclaim, “my punishment is greater than I can bear.”

Gentlemen, during this long and tedious trial the prisoner has been attended by his wife, whose tears and sobs have been the most eloquent advocates for the defense. We have all felt and appreciated their potency. I am glad she was here, as it affords another proof of the undying love, and unalterable devotion of woman. She hovers like a guardian angel around the prisoner, though he is blighted and fallen.

“Around the dear ruin each wish of heart  
Will entwine itself verdantly still.”

She was but a fragile, weak woman, who may have been considered by the prisoner in the day of his pride and pros-



perity almost an incumbrance or a toy to sport with; but in this hour of peril and danger suddenly becomes stronger than a strong man. He is not wholly wretched, for heaven in spite of crime has left him still this one jewel above price.

When the pitiless storm of misfortune bursts in all its fury upon man's devoted head, drenching him with grief and sorrow, she is seen through his tears as the bright bow, promising in the future green fields, sunny slopes, fragrant flowers, and clear skies.

When he is blasted by the lightning of crime, and becomes an object of scorn and detestation to the world, oh! then she is the only support—the only source from whence he can expect sympathy and love—his comforter, life and hope; and all attraction towards the world having ceased, by the great law of her nature she clings to him through life, and to him alone.

This spectacle of woman's devotion, as exemplified in the conduct of the prisoner's wife, should nerve you to protect the sex by punishing the guilty. One hundred thousand mothers in Kentucky, stretch forth their hands and implore the protection of a just verdict for their fathers, husbands and sons. They supplicate you to save them from the sad and melancholy fate of Mrs. Butler and her orphan girl. You saw her upon this stand; you remember that pale, sweet and despairing face. The soft, balmy air of spring again surrounds us, the birds carol in the groves and woo their mates with the sweetest music, the green grass is re-carpeting the earth, the flowers are opening their delicate leaves, and all nature has been resurrected to a new and glorious life; but all is dark, dreary, lone and wintry to her; it is the blast of November, not the warm and genial breath of May that fans her marble brow. Even as she looks into the deep heaven of the fathomless blue eyes of her darling babe, the recollection of those eyes that never had for her but the expression of kindness, will rush upon the brain, thus making the dear pledge of their fidelity and love, an instrument to wring her heart. These remarks are addressed to you, as tending to

show more clearly the prisoner's guilt; not to influence your passions, nor excite your prejudices, but to show the responsibility of your position, and the necessity, if you would avoid such scenes hereafter, of discharging your duty now; for if you fail, you know not how soon this fearful chalice may be presented to your own lips, and you compelled to drink the draught, death, though it may be "There is hope of a tree if it be cut down, that it will sprout; but if a man die shall he live again?" The prisoner may be saved if convicted, but what power shall raise the dead?

It is a fearful thing to violate the law, and become subject to its penalties. Yet, if by a false sympathy, and false ideas of philanthropy, you neglect your duty, you violate your oaths, and not only subject yourselves to the penalty of human laws, but you fall into the hands of the living God. Life is short, and vanishes away, and we shall soon be laid in the cold and quiet grave. When you approach that time, and your heart most remembers what it most wishes to forget;—when the mind becomes clear as it approaches the brightness of the Creator's presence, will it not be sweet to remember that in this case, when so much has been done to thwart your judgments, you yielded not, but discarding prejudice, fear, and favor, marched boldly forward in the line of duty? My duty is now done, yours is yet to be discharged.

MR. MARSHALL, FOR THE DEFENSE.

Gentlemen of the Jury: This is the fifth day since this trial commenced. During that time you have given the most ample evidence, by your patient and profound attention to the evidence and the discussions, that you at least are determined to give the prisoner a fair and impartial trial. You have showed that you at least are not under the influence of prejudice—that you have not believed the numerous partial and discolored statements that have been published and scattered through the country to create a feeling of hostility to the prisoner. You are uncommitted, unbiased, impartial.

After the prepared, well digested, well arranged burst of

eloquence, to which you listened this morning, from the attorney for the prosecution, consuming eight hours of the precious time of this world and this Court, I thought it best you should have a little time for reflection, whether the effect of the burst was warming or cooling. It was something like an exhortation, but never did anything of the hortatory strain fall on my soul so like an iceberg as did this burst of rhetoric. It would have been enough to have consigned the prisoner to his lot, without intruding such a scene upon his feelings. It would have been enough to have left us to our fate, to have consigned us to our early and disgraceful grave, to the stings of conscience, without inflicting on us such a speech. In the latter part, he besought you to commit the prisoner to the grave out of mercy—to deliver us from the stings of conscience by consigning us to the hangman. Allusion has been made to his past journey, and he has been told to commence his travels over again, a wanderer on the face of the earth, with guilt his eternal companion. If he cast himself on the ocean, every white-cap would remind him of the shroud, and every breaking surge, of the death rattle of his victim. If he visited France, or Italy, every opening flower would only remind him of the flower he had left blighted behind him.

In all this, he traveled out of the path of an attorney to torment the prisoner. But he failed. There was neither power in the arm, nor point in the arrow. It has fallen harmless. But the attempt was unjustifiable—it was out of taste. Whatever may be the law and the evidence, I felt there was no necessity to goad you to find a conviction in this case.

In listening to the gentleman's speech, I was astonished; I could not imagine what he was discussing; I could not reconcile his statements with the evidence on trial. But soon I remembered. There is another case out of court, which has been argued in certain newspapers for the last six months—a case supported by fabricated and distorted testimony. I compared his speech with that, and it fitted exactly.

What is the charge in the case the gentleman has been

advocating? It is, that Matt. F. Ward, on the second of November last, without provocation, armed himself for that special purpose, went to Butler's school room, asked for Butler, asked Butler an insulting question, would not receive an explanation, then called him a d—d liar, then struck him, then shot him, all without provocation, without Butler's saying a single aggravating word, and resenting neither the curse nor the blow,—a tolerably bad case, I confess. Yet this is the case made out in the papers—it is the case they are now discussing. The press is engaged in it with all its power, scattering its distorted and false statements all over the country, by every mail. That is the case the gentleman has been arguing, but, thanks to God, it is not the case you are to try. Before we enter into an examination of the law, let us look into the facts. It is not denied that Butler was shot, and that Matt. F. Ward shot him. But how? Why? Under what circumstances?—that is the question.

Twelve boys have been introduced as witnesses, who were present, and most of whom saw the transaction. In regard to their testimony, there is a good deal of conflict. I do not assail their characters, that is unnecessary. The conflict arises from the peculiar circumstances under which they saw, and the attendant confusion.

The first witness is Knight. In his direct examination he testifies to Butler's saying this and that; but on cross-examination, he says he only heard three words, "I'm not disposed." But he heard all that Matt. said. What is the first remark of Matt. to Butler? I have come to settle a matter with you. Knight sees Butler make a motion, from which he infers Butler asked Matt. into the next room; Matt. says, here is the place; Butler's answer is not heard; Matt. then says, since you will not answer that, etc. This shows that Butler had refused to answer. Butler's answer to this last question is not heard. Then Matt. says, why did you call my brother a liar? Butler says, "I am not disposed——" the remainder not heard. This shows that Butler refused an explanation.

Worthington is next examined. He is fifty feet off, yet hears what Butler says. Butler asks Ward to go into the next room; Ward, "no, here is the place where the thing happened"; Ward says something; Butler refuses; witness turns his back, hears stamping, then the shot.

Next, Campbell testifies. When Ward first came in, he was calm and polite. It was not until Butler answered that Ward's blood arose. Witness is within four feet; didn't hear what Butler said; hears Ward say, "Since you won't answer that, I will ask another"; don't hear Butler's answer to that; Ward then cursed him; witness then knew there would be a fight, and turns to arm himself to keep off Bob, till Butler could whip Matt.; didn't see Butler strike Matt., but knew he would; knows he would whip Matt. if Bob was kept off; sees something in Butler's actions that convinced him there would be a fuss.

Minor Pope is next. He hears nothing till Matt. says, "Why did you call my brother a liar?" And when the lie passed, then Butler sprang at Ward and grasped him; and then the shot was fired.

Benedict says he saw Butler lay his hand so violently on Matt. that he bent backwards. Knew that Butler would not lay his hand on Matt. for nothing.

Quiggly didn't see Butler strike, but saw him push him back eight feet to the door.

Now, gentlemen argue that Butler did not strike Ward; but Dr. Thomson says Butler said, "Ward struck me first, I struck him, and then he shot." Dr. Yandell says Butler said, "Ward raised his hand," and Dr. Yandell thinks, in a threatening manner, "and I struck him." Dr. Caldwell says Butler said, "We were engaged in conflict at the time." The boys say Butler did not strike him, and yet Butler says he did.

This proves that Butler did strike Ward, and that they were in conflict at the time. The boys were so excited they knew nothing about it. This is settled by their own witnesses. Knight says Ward gesticulated with his left hand, his right

hand being under his coat; Butler settled back, and thinks Matt. struck him. Another says Butler was catching at Ward's right hand to prevent his shooting. Butler contradicts this, for he did not know who shot him. I take it that it is a total mistake that Butler tried to get the pistol. It is evident, by their own showing, that these twelve boys knew nothing about the conflict.

Matt. made a mild demand for an explanation. Butler asked him to go into a private room. If he wanted to assassinate Butler, why did he not go into the private room and do it? The true construction is, he wanted the matter explained in presence of the school-boys, without concealment or disguise.

Now, to know what the provocation is, we must look farther. He did not kill Butler for the mere pleasure of killing; there must be some other reason. What was it? How came he to go there? We have been permitted to show by his mother what he said about his motive. On her return from Cincinnati she finds William at home; asks him the reason. He says, "Ask Matt." Matt. says that on the day before, just before the class was called to order, William gave some chestnuts to another boy; the boy ate them, and threw the hulls on the floor. Butler asks for his strap. A fashionable instrument, this broad strap; a vast improvement in the art of whipping negroes; can whip a negro nearly to death with them, without breaking the skin, and he is left as smooth as a peeled onion. The whip is brought, and the boy called up. "Who gave you those chestnuts?" "William Ward." "Did you do it, William?" "Yes," but not in recitation time." "Yes, you did," says the other boy. The other boy's word is taken, and William is flogged—not for giving the chestnuts, but as a common liar! Publicly flogged as a common liar by an instrument used in whipping slaves! Now, do you believe that in making this statement, Matt. Ward was making testimony for himself? Never. William had told this story, and told him he did not mind the whipping, but he had rather die than be called a common liar. And

thus feels every boy in Louisville Kentucky spirit is not confined to the Ward family. The poor man's child feels it as much as the rich man's. I deny that the sense of honor is confined to the Ward family. It is not peculiarly an aristocratic virtue. The statement that all this happened because a Ward had been whipped is one of the low means used to create a prejudice.

Matt. further says, as we prove by his mother, "I know Butler to be a gentleman. I will go and have the matter explained, looked into, and examined. Butler has acted hastily. I will go and have this stain wiped off." Was there anything wrong in all this? Wasn't it all right? And what ought Butler to have done? I would not willingly disturb the ashes of the dead. He was an honorable gentleman, and his death a public loss. But, what would you have done? I have been to many schools, and seen boys whipped severely and unjustly. It is not agreeable to a father, and makes an older brother feel unpleasant, especially when whipped on an infamous charge. It was Matt.'s duty to go, and he goes and speaks mildly; and not until an explanation is refused, is his temper aroused. I know what I would have done had I been in Butler's place. I would have said, "Mr. Ward, I had occasion to whip William. I will explain it. I will summon the boys here, and you shall hear the testimony yourself; and if I have done wrong, I will make the necessary explanation." The school teacher has something of the parent's power, and ought to have a parent's love. Wm. Ward is fifteen years old. If a father had detected a son of that age in falsehood, would he have proclaimed it publicly, and whipped his boy in public like a dog? He would do it privately, and with a parent's tenderness. Then if Butler had done what a father would not have done, was it not right for Matt. to seek an explanation? Certainly, and he sought it where the disgrace occurred. There is nothing wrong so far. Butler says, "I will give you no explanation." "Why did you call the boy a liar?" Butler would not explain that either. He put on the haughty to him. He then said, "You

are a scoundrel and a coward; you have disgraced my family; you have refused an explanation; and now you are a scoundrel and a coward yourself." What else could he have done? He either must have skulked from the presence of this puissant pedagogue, or returned the insult. He uses these words. Then he is seized, pushed back, driven back to the door, a poor, emaciated, bed-ridden, neuralgic, rheumatic invalid as he is, and he must be kicked out into the street, or do what he did.

We next come to the testimony of R. J. Ward, Jr. He says Matt. entered and took off his hat, holding his hat in his right hand at first, and then put it on his head. Knight thinks it was in his left hand, but still he was gesticulating with that hand. Where was the hat? Had he laid it on the floor, nigger fashion? Bob's statement explains it all. He held it in his right a part of the time, and then put it on. Bob and Knight agree in many things, and disagree only where Bob's statement is necessary for explanation. The shooting is explained the same way. If his hand was on his pistol, he would have fired before he did. Quiggly says he was pushed back as far as could be. This coincides with Bob's statement. Bob says Matt. drew his pistol and fired. Sturgus comes. Bob told him to stand off, as he says, to come on, as the boy says; I do not care which. Sturgus understood it to be off, for never was a man off quicker. And, by the way, why is not Sturgus here? Talk of our keeping William back, why do they keep Sturgus back? He cut a pretty figure in the Police Court, with Butler fainting on a settee in his room, when there was not a settee within fifty feet.

*Mr. Gibson.* Is that in evidence here?

*Mr. Marshall.* It is in the papers where the case has been prosecuted for the last six months, where this man has been prosecuted, and where they are even now trying Your Honor.

The JUDGE. I do not like to have that referred to. It might affect my impartiality.



*Mr. Harris.* I understand the gentleman. He speaks to the jury, when he addresses the Judge.

*Mr. Marshall.* If you understand yourself when you come to speak, half as well as you do me, you will do well.

*Mr. Gibson.* The papers are not in evidence and the gentleman has no right to quote them.

*Mr. Marshall.* I may want to quote from the Bible, and it is not in evidence. Can I not have the privilege?

The JUDGE. This matter is not properly in evidence, and the gentleman better not refer to it.

*Mr. Marshall.* Bob is further confirmed by the testimony. He says Matt. asked the chestnut question. So do the boys. Bob says, "Butler puts his pencil in his pocket, buttons up his coat, and says he will not be interrogated." Campbell says, "Butler appeared to make a motion," and so throughout the whole testimony. Bob is confirmed by different boys. His testimony explains what theirs leaves dark, and is confirmed by Butler's dying words. He tells a plain, straightforward story, hit or miss, for or against himself. When Sturgus came, he says he drew his knife and told him to be off, and off he was. It was *presto vido* and he is off. Bob also says he did not go up the aisle. The prosecution were making out that he retreated. He says he did not. His testimony bears all the marks of truth, and is confirmed in every particular. After all this, Mr. Carpenter says he is perjured. Not content with building a gallows and placing him on it, for what is indeed a crime, but a gallant one, one which many a brave man sometimes commits, this Carpenter goes farther, and charges him with the dastardly crime of perjury. There is no marks of perjury about him. He made a bold, off-hand, gallant statement of the whole offense. The Commonwealth had proved beforehand all he testified; he added but little to our case. But since a charge of perjury has been made against him, it was my duty to make this defense of his character. This trial by juries, and having witnesses face to face, is a glorious institution. The eye, the countenance, every look and gesture, all speak in confirmation

or contradiction of the words. Never have I examined a witness who has been sustained by all these more completely than Bob.

The next witness is Barlow. What a joyful note Carpenter struck when he came to this man's testimony, and I thought I heard a low chuckle run through the crowd, showing the only trace of prejudice that I have seen in the place. He would insinuate perjury. He asks exultingly, "Didn't you say this was an aggravated murder? Didn't you say it was no use trying a rich man's son in Kentucky, if Ward was not punished?" The object is to prove that he lied in pretending to give Butler's dying words. He testified that he, in Harney's house, asked Butler how it happened; that Butler said, "Ward came there, called me a liar, I struck him, and he shot me." "This is a lie," says Carpenter.

But how is he confirmed? Dr. Caldwell says Butler said they were engaged; another witness says they were clenched; the boys say Butler sprang forward. They all confirm Barlow. But they say he is a liar, because he went and offered his testimony to Ward. Hear his explanation. In the Police Court it was proved that Ward struck Butler first. This was published all over the country, and was prejudicing the whole community against Ward. Barlow knew this was not true, and felt it his duty to go and tell the father of the prisoner the circumstance. But the question is, had Butler told him this? Two hours after the occurrence, he relates the same story to Mrs. Crenshaw. You remember her, with a voice clear as a bell, and soft as a lute. He told Mays the same story in the carpenter shop half an hour after he heard it. But he went to the jail and played cards with the prisoner. And what if, on some cold winter evenings, when the prisoner was in his lonely cell, listening to the shout of the mob seeking for his blood like Cuban bloodhounds, this witness did help him while away a weary hour in some pleasant amusement. But Matt. Ward associate with such a man! Now I had thought that a carpenter might be a gentleman. But here they beg the question, and mark the ingenuity, the infernal in-

genuity of the process. R. J. Ward is a rich gentleman, and his son Matt. is a traveled, literary, refined man, and that low, mean, hellish hatred which some feel towards this class, is played upon to influence the jury, and they are told that the very fact that a mechanic is admitted to their company is proof that he is suborned.

This lawyer, Carpenter, came, I believe, from New Hampshire, but Barlow was born in Kentucky, where there are but two classes of people, gentlemen and slaves; and every man not a slave is a gentleman. Carpenter has brought with him notions not congenial to our soil. Poor and proud is the motto in Kentucky, and the poorer the prouder. If a man is rich, you can take some liberty with him; but if he is poor, keep clear of him, insult him with no bribe. I thought the gentleman lay in the heart itself, and that wealth was but the guinea's stamp. It is by no means strange that Barlow changed his opinion of Matt. Ward in forming his acquaintance. Since I have been here, I have learned that the noble, free, substantial farmers of Hardin have visited him in great numbers in his prison, and when, instead of finding the burly ruffian they imagined, they saw this pale, emaciated, neuralgic, rheumatic invalid, and in conversation have found him intelligent and refined, they have gone away in tears. There must be some powerful alchymy in his presence that thus turns all to friends. If becoming his friend is proof of subornation, it is not confined to Barlow, but half of the citizens of Hardin County have participated in the crime.

But Barlow is confirmed by Allen and Gudgel. Allen heard the shot, and they immediately went and asked the boys how it happened. The boys tell them just what Barlow says Butler told him. His story is also confirmed by his own acts. Barlow stands unimpeached, surrounded with every badge of truth. There is nothing strange in the cards—nothing strange in becoming the friend of Ward, after forming his acquaintance.

I think we have now got at the correct facts in the case. William Ward, fifteen years of age, on the first of last Novem-

ber, is severely flogged by Prof. Butler, and flogged too in the public school, and called a liar. He goes home and tells his brother. His books are sent for and removed. Matt. Ward, in feeble, delicate health, goes to ask for an explanation, taking William with him, and Bob, at his mother's request; not anticipating a difficulty with Butler, but on account of Sturgus. He goes to the school house and politely and mildly asks an explanation. This is refused, haughtily refused. All satisfaction is denied; then he charges Butler with the same crime Butler charged his brother with. Then Butler colared him, bent him, bore him back to the door, and then, and not till then, Matt. fired.

Next, as to the relative strength of these men. It has been shown that Butler's hand was contracted. This did not prevent his striking. Patrick Joyce says he was remarkable for his strength in his arms; that on ship-board he could climb a rope, hand over hand, sailor-like; that he could perform feats in a gymnasium requiring great strength in his arms. Yet they say he could not strike; but Campbell knew he would strike, and could whip Matt. Matt. F. Ward, feeble and attenuated, with muscles shrunk and stiffened, a man whom even his wife could whip, as has been testified;—could such a man go there to assassinate Butler? As Kentuckians, interpreting criminal law as Kentuckians do, I ask you, is this cold-blooded, premeditated, deliberate murder?

Having got a correct statement of the facts, as derived from the evidence, let us apply the law to them, and see if it is not clearly a case of self-defense. I read the following quotations from Blackstone, on personal security, and the redress of private wrongs.

"The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, and his reputation.

"Both the life and limbs of a man are of such high value in the estimation of the law of England, that it pardons even homicide, if committed *se defendo*, or in order to preserve them. For whatever is done by a man to save either life or member, is looked upon as done upon the highest necessity and compulsion.

"Besides, those limbs and members that may be necessary to a

man in order to defend himself, or annoy his enemy, the rest of his person is also entitled, by the same natural rights, to security from the corporeal insults of menaces, assaults, beating, and wounding, though such insults amount not to the destruction of life or member.

"Next to personal security, the law of England regards, asserts, and promises, the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation as inclination may direct, without imprisonment or restraint, by due course of law.

"The defense of one's self, or the mutual and reciprocal defense of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relatives be forcibly attacked, in his person or property, it is lawful for him to repel force by force, and the breach of the peace which follows, is chargeable only upon him who began the affray. For the law in this case respects the passions of the human mind, and (when external violence is offered to a man himself, or to those whom he bears a near connection) makes it lawful for him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process is by no means an adequate remedy for injuries accompanied with force, since it is impossible to say to what greater length of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society. In the English law, particularly, it is held an excuse for breaches of the peace, nay, even for homicide itself; but care must be taken that the resistance does not exceed the bounds of mere defense, and preservation, for then the defender would himself be the aggressor."

Such then is the law of self-defense. It is the first law of nature, and pervades all its departments, animate and inanimate. Everything seems to have its natural enemy, and is furnished with its peculiar means of defense. The bark of the tree, the rind of the fruit, and the cuticle of the vegetable, are all means of defense. And so in the animate world, every animal has its weapons for protection. Even to the serpent, that cursed, blasted creature, sentenced to crawl on its belly, and lick the dust, even to that creature, God left his venom and fang, when he pronounced his curse.

This right of self-defense carries with it all the means necessary for its exercise. It must be used cautiously, but it gives me the right to beat, maim, or kill my opponent, not only to save my own life, but to save limb, or any serious injury,

whether it be actual or apparent. That life is not worth possessing that I have not the right to defend. If I had not this right, I would raise my own arm, take my own life, and hurl it back into the face of high heaven—a despised and worthless gift.

As to the amount of force I have a right to use, necessity is the only measure. If Matt. Ward should undertake to whip me, and I should kill him, I should be guilty of murder, for I could hold him with one hand. But there are other men that might undertake to beat me. Suppose a stout man should attack me, I strike him, and he would lick me five times worse. If I had a bludgeon, I might use it; but I have none. Must I stand and be beaten? Will any Kentucky man tell me to stand that? No; If I had no other weapon, I would out with my knife and cut his throat from ear to ear. The right of self-defense is nugatory, unless it carries with it all the means necessary for its exercise. Read your old musty law books! This is the criminal law in Kentucky; so acknowledged, and so administered. I have defended many criminals in my life, and this is the law wherever I have practiced.

Now take this law and apply it to this case. The law as I have declared it is the law of the land. Apply this law to the facts as I have adduced them from the evidence, and see if this can be called a crime of murder; and if it is not murder, it is not anything. The difference between murder and manslaughter is very slight, as shown by the books. When a man is driven as far as he can be, and then slays his adversary, it is self-defense. In this instance one of these men was powerful, very powerful, weighing one hundred and thirty-five pounds. I have seen such whip men of twice their weight. The other is a feeble invalid, in no condition to fight, goes expecting to ask a civil question and receive a civil answer, is refused an explanation, resents it in words, is seized, bent, pushed back, and at last, fainting and falling, he rids himself of his adversary, fires his pistol, and most unfortunately, the shot is fatal.

Had he shown himself, by this act, unfit to live, to hold a

place among his fellow beings? Or, coming down to the next grade of crime, will you, for this act, send him to the penitentiary? Will you tear him from his girl-wife? Will you shave those classic locks? Will you sentence him to a confinement, to which there is, to a man of high and noble impulses, no equal in the category of human punishment, and only paralleled in the other world by the prison house of devils and damned spirits? No: as his friend, knowing his feelings, I ask you, rather than do this, tear away his life. In his name I ask, give me liberty or give me death. If you call that mercy, give the mercy that Carpenter spoke of,—the mercy of the grave. Death in any form is preferable.

But Mr. Carpenter told you, you had nothing to do with mercy, and that if you had, you could not mitigate the stings of conscience. We can bear all the stings of conscience this deed inflicts, but we do feel deep, lasting, pungent regret. We would do anything to recall the deed. We feel every sympathy for the family of the deceased. But the stings of conscience we feel not, for we are conscious of no crime. We fling ourselves on our country and our God for trial. Not guilty, we say now, not guilty, we say living, not guilty, we say dying. The deep and damning effects of one kind of verdict, we look upon with horror.

Evidence has been introduced to prove the good character of the prisoner. Senators, members of Congress and of the Cabinet, mechanics of every class, officers and preachers, have all testified to the meekness and kindness of his disposition. He traveled abroad, poor fellow, for his health, and here is a book ("Letters from Three Continents,") that shows how he spent his time, and what were his reflections on the various spots he visited. It is not in evidence, and I cannot read from it; but I thank him for this contribution to our literature. In imagination, I have followed him in his travels, and with him passed down the Rhine, crossed the Alps, gone down the Danube, passed the Golden Horn—stood with him at Stamboul, gone up the Nile, crossed the Desert, and stood with him on Sinai, where God gave the law to Moses. Could I read you

his reflections there, you would see that he was of too high and pure feeling to harbor malice to a fellow being.

It is a pity that he should die so young—his country has looked on him hopefully—but that he should die after the fashion sought by the prosecution, is awful. I ask you not to pardon, I ask you not to relax the rigor of the law, but I do ask you to administer justice tempered with mercy. Look at the evidence, and answer me if that young man should die, and die a felon. It cannot be. I believe in omens—knowing the efforts made to prejudice the public mind, and finding a jury could so readily be panelled, I felt there must be an acquittal. Such a verdict will be looked for, and such a verdict will be vindicated by the whole country, when the testimony is published.

But I have talked till I have wearied you and exhausted myself. There are those to follow me, the latchet of whose shoes I am not worthy to unloose, and they will supply all my deficiencies.

*April 24.*

*Mr. Harris*, for the prosecution, addressed the jury between two and three hours.

MR. HELM, FOR THE DEFENSE.

Gentlemen of the Jury: I have often addressed you in the jury box and from the rostrum; on the stump and in the muster field. You are all aware that in the discussion of any subject in which I feel a deep interest, my manner is usually excited and earnest, but on this occasion I speak under great disadvantage, having been confined to my bed by illness almost constantly for the last two months; and only hoping that I may be sustained and that you may bear with me, until I can discharge the solemn duty I owe to my client.

I feel, perhaps, more deeply interested in this case than I ever have felt in any other in which I have been engaged. I feel thus from the nature of the ties that bind me to the family of this defendant. Many years ago, when I first entered the political field. I met his father in the councils of the State;



and again and again have I associated with other members of the family there. And as in the beginning of my humble political career, these men took me by the hand and gave me their aid and support, I have ever felt grateful to them; and now, that an event has unfortunately occurred by which I hope to be enabled to do something, so far as my poor ability goes, to cancel the debt, you cannot wonder that my deepest sympathies are enlisted.

The gentleman who preceded me has alluded to outside influences—to the fact that this prisoner was driven from his own home, to seek justice here. It is true that from the moment the event occurred for which he is on trial, distorted and prejudiced accounts of it were given to the public; and, accompanied by articles of the most inflammatory character, were spread upon the wings of the wind by the newspaper press. Therefore, this excited feeling was caused, and therefore, the prisoner asked only what the law gives—that he might be tried in an unbiased and unprejudiced community. There were other counties in that circuit much nearer Louisville than this, and no one expected this would be selected. But the Judge, perhaps willing to rid himself of the perplexity of such an exciting trial, on his own motion removed the venue here, to the great surprise alike of the prisoner and all his counsel. But now that his cause is brought before you, he only asks at your hands a fair and impartial trial.

Another circumstance alluded to, was the position of Mr. Ward. He has been held up to you as the possessor of great wealth, and repeatedly called a millionaire, to invoke an improper and unmanly feeling against him. Now, though there is nothing whatever in evidence on this point, I feel it my duty to correct the impression that has been left on your minds. Mr. Ward is the possessor of no such princely fortune as you have been led to believe, and the property of the family consists of one house and lot in Louisville, a partnership in a commission store in New Orleans, and, by the mother of the accused, the plantation in Arkansas owned by him, with, perhaps, a few slaves.

The counsel for defense have been alluded to. I did not think, after importing a man from the vicinity of Cincinnati, in addition to the other counsel retained, to assist the officer of the State, and to make an eight-hour speech to this jury, we should hear any remarks on that point from the prosecution. The truth is, the accused expected, and it was currently reported, that some of the most distinguished lawyers in the land had been engaged to conduct the prosecution. It was said, at different times, that Rufus Choate of Massachusetts, Thomas Corwin of Ohio, John Bell of Tennessee, and other counsel of equal ability and power had been retained. It was, therefore, determined, and whether properly or not, you can judge, that men of talent and reputation should be employed in the defense, and that Greek should be met by Greek.

I have spoken of the excitement that existed and still exists in regard to this case. I do not wonder at it—I do not condemn it. When I read the first accounts of the transaction that appeared in the newspapers—very different accounts, gentlemen, from the facts that have been elicited before you—I was excited and exasperated, and I cannot blame the masses that their feelings were aroused, for it only shows that their hearts are right, and naturally revolt at scenes of outrage and of wrong. But when a man is brought to the jury box for trial, those who would endeavor to excite a feeling against him, either because he is rich or because he is poor, ought to hang their heads in shame. Who of you, gentlemen, is not striving to obtain a little of this world's goods; and what can you think of those who, when a man is charged with crime, because, by honorable means, he has succeeded in amassing property enough to support him in ease, would say: "Never mind the justice of the case—never mind whether he be guilty or not—he is rich, and let us hang him"? As the first gentleman who addressed you in this case remarked, "So long as we are true to ourselves, our country will be safe, and the tree of liberty will continue fresh and green." But those who would excite such prejudices and build up such distinctions as these are recreant to justice and to patriotism. Here,

I will not follow the example of others and say that if you do not find as I believe, and as I direct, you must, therefore, be guilty of the vile crime of perjury.

In the feeble state of my health, I shall not endeavor to do anything more than discuss the case in plain, familiar language, which you can all understand, with no attempt at rhetorical display. And I do it with but the single purpose of rescuing my client from the fate which impends over him, if it may be done consistently with justice and honor.

I am ready to meet the gentlemen in regard to what they have said of mercy. The law makes it your duty to hear a case fairly, and where the evidence is such as to justify the act for which a prisoner is arraigned, or to satisfy you of his innocence beyond a reasonable doubt, to return a verdict of acquittal. It is an old maxim of law, that it were better for one hundred guilty men to escape than for one innocent man to be punished; and I lay it down as another proposition not to be controverted, that in criminal cases, where your mind is in a state of oscillation, and you are compelled to weigh carefully and consider nicely before you can come to a satisfactory conclusion, that very fact implies doubt on your part, and you are bound to acquit.

The gentleman has read to you that where a man is killed and there was no malice expressed, the law considers it implied. But if their own testimony has been such as to deny that implication, it must at least raise a doubt in your minds, and all doubts inure to the benefit of the prisoner. I contend the prosecution have brought proof to deny that presumption of malice. They have shown that the parties met politely; that the manner of the prisoner was mild, bland and gentlemanly, and that in conversation hot words were given—a scuffle ensued, and blows were struck, even according to their witnesses the first being struck by the deceased. Does not this effectually disprove the implication of malice?

Malice is a necessary ingredient of murder, and if you doubt that it existed, you must fall back on manslaughter. If you then doubt whether the act for which this prisoner is

on trial was manslaughter or justifiable homicide, you must acquit him; for to give him the benefit of every reasonable doubt is emphatically a part of the duty you are sworn to perform.

It is my rule before examining the testimony of a case, first to read the law applying to it, that I may afterwards present the facts, and show the bearing of the law upon them. And on this occasion the first point for us to ascertain, is, what constitutes murder. In Russell on Crimes, Vol. I., p. 482, it is defined as "The killing of any man, under the king's peace, with malice aforethought, either express or implied by law."

Malice, you will observe, is a necessary and very important ingredient of the crime; let us, therefore, look a little further, that we may fully understand in what it consists. It is very clearly defined, in McNally's Evidence, pps. 378, 379, from which I will read you an extract. Russell (482) also speaks of it as follows: "It should, however, be observed that when the law makes use of the term 'malice aforethought,' as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars; but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, a heart regardless of social duty and deliberately bent on mischief."

The heart, you will observe, is here looked upon as the great motive power that prompts men to commit a crime and do a wrong. This is an important fact for you to bear in mind in this case; for I think we have clearly proven by the testimony as to his character and disposition from infancy—his proverbially gentle and unoffending nature, and numerous circumstances surrounding the case, that this prisoner could not have been prompted by "a heart bent on mischief, and regardless of social duty, and a wicked, depraved and malignant spirit." If you are convinced that he was not prompted thus, it is your duty to acquit him of the charge of murder.

The difference between malice express and implied, and the circumstances under which it may be implied, are pointed out

in Russell, p. 482. It may be either expressed or implied from certain reasons, but this implication is merely an inference—only a presumption, and if I am able to meet it with facts that combat and destroy that presumption—of course it can have no effect.

It must be remembered that we have no written law in Kentucky relating to these points, and that the authorities from which I have been reading are English authorities. Many of these old books, being compiled from various sources, collecting here one maxim of law and there another, contain many inconsistencies and contradictions; and, moreover, their tenor is much more stringent than the decisions which usually are and always have been made in the United States.

As an illustration of this, when in this case we made a motion for a separate trial, His Honor remarked that according to the rules of British law it was doubtful whether it could be granted. But the custom to grant a severance when desired has prevailed so long in Kentucky that it is the rule and the law as propounded here, and among the counsel of high character and ability who were present, not one ventured to deny or object to the proposition.

And if the gentlemen design in this prosecution to rely on the rigid and stringent rules of British law, we can readily show you how much that law has been liberalized and ameliorated here. They read from the books that a man when attacked must retreat to the wall, and that his life must be in imminent danger before the law would justify him in killing his adversary. But I can point out to you American authorities and decisions, showing that he is justified in taking the life of his opponent, not only where his own life is in danger; but where he is in danger of great bodily harm, or has reasonable grounds to apprehend that he is in such danger. This is an important fact; it is right and proper that we should come home to our own manner of modifying and administering the laws, and so His Honor decided.

But, gentlemen, I think we now fully understand what is meant by malice; and let us proceed to the testimony of the

case. Let us first endeavor to ascertain the motive. How do we find this defendant—how had his mind and heart been engaged, when he visited the school room of Prof. Butler? He has been employed, with his young wife, in making preparation to depart, in a few days, for his plantation in Arkansas. He had been making purchases with that view, and their passages by steamboat were already engaged. Now if the heart and mind seemed engrossed by proper and natural subjects, it is reasonable to presume that they were engaged on nothing foreign and wrong. Two witnesses who saw him—the one on the evening previous and the other on the very morning of this transaction, tell you that he was engaged in ordinary business and that they noticed in his appearance nothing different from his usual bland, quiet and courteous manner. This certainly would seem to indicate a mind free from malice, and I appeal to your sense of reason whether it would naturally have been the case, if he were cherishing the intention to do an act which must result in the death of a man who had resided in his father's family for two years—a man with whom he never had a single word of difficulty but whom he esteemed as a gentleman and loved as a social friend.

Up to this time, there can be no presumption of malice; on the contrary, everything indicates quite another state of mind. But, while his father and mother were both away, Willie returned from school, and said to him: "See how I have been whipped; but I don't so much mind the sting of the lash, as being called a liar in the presence of the whole school. I would rather have died than that." Then what did the prisoner do? In all the examples the gentlemen have read here, from first to last, the stimulating cause of the homicide was brought home to the man himself. But this defendant had no grievance of his own to redress; he had not been insulted—he had not been struck.

What said the little boy to him? "Brother, I wish you would go around to the school house, and have this explained." And, just at this point, let us stop to inquire who that brother was. The gentleman who opened the case for

the prosecution has objected to our course in bringing, among others, men who hold high rank in public life, to show his disposition and previous life; and asks triumphantly why we did not produce Tom, Dick and Harry, from the city of Louisville, to prove his character. But I ask you, gentlemen, if we have not established it beyond a shadow of a doubt, and that, too, by witnesses of all ages, circumstances and positions in life? We have traced him from the time when he prattled, an infant in his mother's arms, through the trying days of boyhood and youth,—in school,—in college,—amid the temptations that surround young manhood,—in the social circle, and in travels on foreign shores,—and, under all these circumstances, we find him ever the warm, faithful and affectionate brother and son, friend and schoolmate,—and, in after years, still the same kind, frank, and genial gentleman. Free from the vices of youth and of manhood, wherever he has gone, he has left behind the same impress, by the mildness and gentleness of his demeanor—the kindness and warmth of his heart.

This is the man whose little brother, in the absence of his father, besought him to go and ask an explanation, and of whom you are to judge whether he was actuated by bad and malicious motives, when he complied with the request. But they contend that he bought the pistol for the very purpose of shooting Professor Butler. I reply, that unless the manner in which he used it afterwards was unlawful and wrong, and sufficient to produce conviction, the fact of the purchase can have no bearing upon the case. Every doubt must be in his favor; the fact of him procuring arms was not remarkable, for we have shown that he was about to leave, in a few days, on a long journey to his plantation in the South.

Well, he bought the pistol, and what next? Three doors above, we find him making arrangements, in an interview not sought by himself, for the repair of a little musical box, to while away some of her winter hours, and afford pleasure to his young wife in her new southern home. The circumstance may seem a trivial one, but I think, as it shows how the heart and mind of the prisoner were occupied, it will give us

some indication whether they were under the influence of malice and malignity, or not.

We have seen what took the prisoner to the school house; you have heard his declarations both on the way and before he left home, and you are able to determine his motives, as far as we may judge of human motives from human actions. "But," say the gentlemen, "he had his pistol in his pocket, and, therefore, he must have gone with a heart bent on mischief." Did you notice, gentlemen, the confusion of one of their own witnesses on the stand—Dr. Thomson—when asked if he had any weapons on his person? You know the only natural inference to be drawn from his manner, and his refusal to answer the question, unless compelled to do so, as well as I. And even my friend who preceded me, and was so horror-struck at the idea of a weapon in the possession of this prisoner, according to the best of my recollection, was in such condition during the whole of the last political campaign, that if a little boy had chanced to approach too near his person, with a lighted stick, he would have been sure to go off at once!

"But," ask the gentlemen, "why have you not proved that it was the previous habit of the accused to arm himself when about to travel?" They must be afflicted with very poor memories, or they would recollect that we did attempt to prove that very fact, but were prevented by their own objection. "That," said they, "is not evidence," and it was ruled out by the Court. Then they triumphantly turn around and ask: "Why didn't you show the fact?"

They will read you authorities to show that, because a pistol is a deadly weapon, the law will presume malice in this case. Now, I will repel that assertion by this fact. In the store where the prisoner procured it, there was a great variety of instruments, of all kinds. But he chose the least weapon in the whole establishment—one that, in nine cases out of ten, would not produce death. The law that the gentlemen will read you, refers to the old English pistol,—not to mere pop-guns such as this. The weapon has been produced here, and you can judge for yourselves of its deadliness. The circum-



stances under which it was used—the contiguity of the parties at the time—remember, were brought on by the deceased himself, and not by the prisoner at the bar; he could not avoid it.

Now, if he intended to produce death, why did he not procure a weapon that was sure to do so? If it were vengeance and death only that he sought, he knew of the event the night previous, and why did he not go, under the cover of darkness, at the still hour, call out Professor Butler and take his life, when he might have had an opportunity to make good his escape?

But, admitting, for the sake of argument, the proposition of the State, that he procured the pistol to be used on that occasion, even then, I combat the presumption of malice. I ask you again, is it probable that a man with such a disposition, possessing so many of the elements of a man of honor and a gentleman, would go with a deliberate intention to shed the blood of a man he respected and loved?

He had not been insulted; he merely wished to set his little brother right. You will remember that, before he left the house, his mother insisted on Robert going with him, reminding him, as a reason, of the enmity of Sturgus. He was aware of that enmity before; and it may be that he had thought of it, and reasoned with himself thus: “I am going to perform a sacred, social duty which I owe my brother; he has been whipped and denounced as a liar; and, in the presence of the school,—in the presence of those very witnesses who saw his disgrace,—I am going to have the matter investigated and explained, and to learn whether he was really wronged. But I am weak, feeble, utterly unable to defend myself in case of difficulty. I know there is a man there who is my enemy; the sympathies of his pupils must be with him, also, and, as, per possibility, in the performance of this duty, some difficulty may ensue with him, I will take this little thing along to frighten the boys and keep off Sturgus.” Now, I appeal to your candor, gentlemen, if it is not more reasonable,—more consistent with the character of the prisoner,—than whom no man, living or dead, ever proved a better,—

more consistent with the circumstances and the occasion, than the inference that he procured the weapon with a malicious intent to take the life of the deceased.

If then you believe that he obtained the weapon but for the purpose of self-defense, and only used it when in danger of great bodily harm, according to both reason and law, his act was justifiable homicide.

As I have said, they will read from authorities to convince you that the use of a deadly weapon leaves a necessary inference of malice. I contend that it does not. Russell, p. 482, says: "Presumption of malicious intent may arise from the nature of the weapon used in the preparation of the deed."

This is the phraseology of the American law—that of the British law is, *must*. You will perceive in this another exemplification of the fact that the old English law, as administered here, is materially liberalized and modified. And even here in our own State, I contend that this necessary presumption of malice, in cases of shooting, is totally disproved. In our Revised Statutes, p. 264, the law reads as follows:

"If any person shall, in a sudden affray, in sudden heat and passion, without previous malice, and not in self-defense, shoot and wound another person with a gun or other instrument loaded, etc., whereof the party doth not die,"

then proceeds to fix the punishment by fine and imprisonment in the county jail. Now by the law of Kentucky, I contend that the question is settled that a shooting may take place in the absence of malice expressed or implied.

But Russell, p. 520, note, says:

"No provocation, however grievous, will excuse the crime of murder, when from the weapon or the manner of the assault, an intent to kill or to do some great bodily harm was manifest;"

and the prosecution argue that an intent to kill may be inferred here. And here I bring you back to the question whether it was the intention of this prisoner to take the life of the deceased. If you are satisfied that he bought that pistol intending to use it offensively and to take away life, you are to return a verdict accordingly; but if you believe from the facts

of the case that he bought it but for purposes of self-defense, and only used it in the last extremity, when he was absolutely forced to do so, it will be your imperative duty to acquit him.

Suppose you, sir, were told that the character of your daughter had been defamed, and you determined to go and seek an explanation and retraction from the person making such statements, in the presence only of those who had heard him utter them. You might know his character and disposition, from previous acquaintance, and they might be such as would lead you to believe that you had been misinformed in regard to his language, and that he would readily be able to give a satisfactory explanation. Yet, in view of the remote possibility of collision and danger, the man you sought being far superior to you physically, if you armed yourself before the interview, would you not do it purely for the purpose of self-defense, and with a heart harboring no malice?

That such were the motives which actuated this prisoner, there can be no reasonable doubt. The explanation he sought was proper, to relieve the feelings of his little brother. The time was proper—it was right that the explanation should be made then, in the presence of the whole school. And the place was proper; the school room is not, as the gentleman would have you believe, a man's own house and therefore his castle; but it is a public place where he performs his ordinary duties and transacts his legitimate business. And I think you are fully convinced that the prisoner sought the school house only for the purpose of investigating the case and obtaining a proper explanation.

Another fact. When he formed the intention to visit the school house, Robert was in Cincinnati, and he was then going, unaccompanied by any one except his brother Willie, who, as the party most nearly concerned, desired to be on the spot when the explanation was made and to confront all that should be brought against him. He did not ask Robert to go; he did not even consent that he should go, until his mother insisted on it so earnestly that he complied to gratify her feelings. If Robert J. Ward, Jr., is such a dangerous young man as the

gentlemen would make out here, this only shows that the prisoner wished to avoid all possibility of collision and difficulty.

If a man contemplated murder, would he be likely, in broad daylight, to seek a point where he could be seen and heard by fifty witnesses, and there do the deed? Would any man in his senses take such a course? Gentlemen, it is opposed to every principle of reason—the presumption is perfectly absurd.

Look at the subsequent conduct of the accused. We are told that, “The wicked flee when no man pursueth; but the innocent is bold as a lion.” You have heard of the anxiety he felt for the condition of the wounded man; how, the moment he heard the voice of the officer at his father’s door, he immediately came out and promptly surrendered himself up, to await the proper judicial investigation of the affair. Had he intended to commit murder, it is reasonable to suppose that he would have taken at least some of the ordinary precautions for escape. But every circumstance of the case—the character of the man—his disposition—his acts both before and after the affray, and the harmonious relations of the parties—all tend to refute, triumphantly, any presumption of malice.

Gentlemen, I have been requested to correct a statement which you have heard, that Marshal White went with this accused to Col. Harney’s residence, to ascertain the condition of Prof. Butler. Such was not the case. When Robert J. Ward met the City Marshal and an assistant officer on the street, he suggested that one of them should go and learn how Mr. Butler was, while the other went to his house to arrest the prisoner at the bar. Mr. White, however, knew the prisoner well, and from his knowledge of his character and disposition, had an abiding and firm conviction that he would make no attempt to leave the city. Hence he first went to the residence of Col. Harney, to inquire after Mr. Butler, and then repaired to Mr. Ward’s house, where he found Matt., as you have already been informed.

And for this, one of the most respectable and honorable officers of the city of Louisville is represented to you as conniv-

ing at the escape of a prisoner, because he was the son of a rich man! How much reliance is to be placed on such representations, you, gentlemen, can judge. Mr. White has been honored with the trust of the people because he is a faithful and zealous officer, and a high-toned and honorable gentleman. He knew there was not the least danger of any attempt to absent himself on the part of the prisoner—he knew that he was a man who, acting only as he deemed right and proper, would never fly, having no guilty conscience to accuse him. The result proved that he did know the accused, whatever the gentleman may say. And is not this alone a commentary on the character of this prisoner which you have no right to overlook? He is no desperate ruffian—no midnight assassin, but one who, though he may have committed one unfortunate act, still retains in his bosom the proudest elements of a man and a gentleman, in all the relations of life.

My friend, Mr. Harris, thinks that inasmuch as I alluded to him before dinner, as a sort of walking arsenal, I ought to do him justice by saying that he never carried arms except when he had just occasion to do so. I presume that this is the case. I have confidence that he never carried a weapon in his life for any other than a defensive purpose, to be used only when absolutely necessary; and this, gentleman, I also contend is equally true of my client. My friend has also made allusion to a scene in his juvenile experience. He tells you that he was once whipped at school; and that when he returned home and told his mother, she whipped him again, and then sent him back to the teacher, with instructions to punish him once more. Well, he has endeavored to impress the fact upon your minds, that a mother knows her son, and understands every point in his character, better than any other person on earth; and I have no doubt that in this case the general principle was true, and that his mother, knowing what was best for him, and what he really deserved, acted accordingly.

As he has related an episode in his personal history, I might give you an incident in my humble experience. I once went to school to a teacher who has since occupied distinguished

positions in life, but who was a cruel and hard-hearted man. I have seen him lay eighty-seven lashes on the back of a pupil, and there was not a dry eye in the whole school house. On one occasion, during the absence of my father, in punishing me, he inflicted such a wound on my face, that when I unfortunately took cold in it, my jaw was swollen to twice its usual size, and I was compelled to carry my head on one shoulder for weeks. When my father returned, he learned of the occurrence, though I did not tell him of it, and he sought that teacher, and would have drubbed him soundly for his brutal conduct, had he not been prevented by his friends. There has been of late, a great change of public sentiment on the subject of whipping; and it has been abolished, not only in the English and American navies, but also in all well regulated schools. The world is beginning to learn that the sway of love is more potent than brute force.

The gentleman may talk of universal principles, but there is no principle in nature more universal than the law that kindred blood will stand by kindred blood. Go into the forest, and even the lowest vermin in the range of animate creation will resent an insult offered to their kindred blood. The hen, the pheasant, and the gentle partridge, the wildest bird in our woods, will flutter around their offspring to protect them from impending danger, and punish any insult that may be given them. And I have somewhere read of an incident in which the sluggish and stupid pelican, when she saw her nest robbed, and her young taken rudely away before her eyes, while she had no power to protect them, with her beak tore out her own bleeding heart in agony and despair.

I ask you if there can be a higher sentiment than that which, when the father is insulted, or the child is outraged, prompts son or brother to resent it? Our feelings and our passions come from on high, and no human law can repeal the laws of the Almighty. As well might you command the waves of the ocean to cease their turmoil—the broad leaves to fall no more at the approach of the frost—the buds not to swell, and the flowers not to unfold in the warm breath of Spring, as to at-

tempt, by any verdict that you can render, to blot out from the human heart this kindred sympathy and kindred love. As long as man lives, the principle will exist, and it is right that it should be so. Would you have us dead, and inanimate to every generous pulsation of the human heart—callous as marble—Ishmaelites on earth, with our hands against our brother, and every man's hand against us? It cannot be; blood will cleave to blood.

What then has this man done? He sought to perform an act of justice, and he asked the explanation which was his due, in the very mildest form. The gentlemen will tell you that he ought not to have taken a weapon with him, but I contend that in his weakened and enfeebled state—an invalid, weighing only 110 pounds—it was perfectly legitimate and proper under such circumstances for him to be prepared to ward off any other and deeper injury that might be done him. I ask you, when you go to your room, to consider his character, his antecedents, his conversation—all the circumstances, and then inquire if it is probable he sought that school house, intending to commit a murder, in the presence of fifty witnesses. I feel an abiding conviction, from all the proofs in the case, that he no more intended to use that weapon offensively than I now intend to draw a weapon from my pocket and plunge it into the heart of some man in this jury box.

But they say he brought on the difficulty. Let us look at the facts. In the eyes of the law, words can justify no assault. He went for an explanation; he asked it in a gentlemanly way; that was the proper place for it; in the recitation room it would not have answered the purpose, for the boy might still have been proclaimed, and believed, by his companions, a liar. It was not until all explanation was refused, that Ward used offensive words, and even had he done it before, remember that they cannot justify an assault. What could he do? No investigation, no redress, no justification of the act—was there any other course left than the one he pursued, when he applied the opprobrious epithets to his adversary?

It is true that Butler was an unexceptionable man—a very

good man, if you please ; but we are trying another good man. And after Butler had lived in the family so long—when he knew all its members to be his friends—after he had inflicted wounds deeper than those of the flesh—a stain upon the character and the honor, was not an explanation due—would it not have been a simple act of justice ?

The prisoner did not assault him—did not waylay him, as he would have been likely to do, had he only sought vengeance and blood—but he went on his errand of duty to his little brother, with the frankness of his nature, with the frankness of a man, directly to Mr. Butler ; in a mild and courteous manner, as one gentleman always treats another, he asked the explanation which was twice so haughtily refused. Then offensive language was used ; he was attacked, and the result was produced which has brought us here. Can you believe, when he determined to perform a high and sacred duty, and simply place his little brother right, if he had been wronged, that his heart was under the influence of malignity and malice ? Such extremes cannot exist in our nature—they are at war with reason and common sense.

It is said that if a man brings on an assault by giving just provocation, he is not justified in repelling it. Now, that you may see what acts the law regards as evidence of intention to provoke an assault, I will read you the case of Richard Mason, from Russell, Vol. I, p. 220. After relating the circumstances, the author says : “In the foregoing case it will be observed that the blows with the cudgel were a provocation sought by the prisoner, to give occasion and pretense to the dreadful vengeance which he meditated ; and it should be observed that where the provocation is sought by the party killing, and in order to afford him a pretense for wreaking his malice, it will in no case be of any avail.”

Do the facts indicate that the provocation was sought here for any such purpose ? The only satisfaction left the prisoner, after all explanation and justice were refused, was that of hurling back precisely the same insult that had been offered to his brother, and thus making the one offset the other. When



this produced a collision, his acts did not indicate that he had given provocation that a pretext might be offered for wreaking vengeance, for he only used the weapon as a last and direful resort, in a case where there was no other alternative.

Another case in point, which will show how far manslaughter goes, is that of Luttrell, reported in Russell, p. 515.

Having disposed of the charges of murder and manslaughter by citing the law and applying it to the facts, I will now take up this case as one of justifiable homicide. There are some instances in which the line separating it from manslaughter is hard to draw; but according to my humble conviction, there will be no such difficulty here. This seems to me beyond the shadow of a doubt. I believe it as clear a case as ever was made out, of a man killing in defense of his own life. Yet should any doubts linger in your minds, whether the act for which my client is now on trial was manslaughter or justifiable homicide, it will be your duty to acquit.

In regard to the circumstances that render homicide excusable, Russell tells us, p. 514, note, "Among equals the general rule is that words are not, but blows are a sufficient provocation." And in Wharton, p. 256, we read: "There may be cases sometimes occurring, though very rare and of dangerous application, where a man, in case of personal conflict, may kill his assailant, without retreating to the wall. The assault may have been so severe as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defense, if there be no other way of saving his life, he may kill his assailant instantly."

You see, gentlemen, that there are instances in which a man is justified in killing his adversary, even without retreating to the wall. But such was not the case here. The prisoner, at the time he shot, had retreated to the wall, and if he was then in danger of receiving great bodily harm, he was justified in killing his opponent.

In Russell, p. 661, note, we find the principle laid down that, "Where upon the trial of an indictment for murder, the prisoner attempts to justify the homicide on the ground

that it was committed in self-defense, he must show to the satisfaction of the jury that he was in imminent danger, either of death or some great bodily harm."

This is the old Common Law of England—but here it has been modified and ameliorated. In the case of the State of Tennessee v. Granger (Yeager, Tennessee Reports), the principle was established that when in case of conflict, a man believes, and has ground to believe, that he is in danger of great bodily harm, he is justified in killing, whether he really was in such danger or not. His right to defend himself cannot be abridged, and if he has good reason to apprehend great danger, from the facts by which he is surrounded, the homicide is justifiable.

At the outset of arranging my proof, I wish to say that I do not purpose to attack the school boys who have been introduced by the Commonwealth. I have kind feelings towards all of them; I believe them utterly incapable of stating a falsehood, knowing it to be such. But our object in bringing Mr. Allen and Mr. Gudgel to the stand was to show that before the occurrence, from the rule of school, which prohibited turning around in the seats; and after it, by the unusual excitement and consternation which prevailed, by the drilling to which they have been subjected, and by reading every day publications of what they were expected to state—the impressions now on their minds are many of them incorrect. We desired to prove that then, while the occurrence was fresh in their memories, and before any improper influence had been exercised upon them, they gave quite a different account of it. While we impute no improper motives to the boys, can anyone doubt for a moment that these gentlemen saw them at the school house, asked how the affair had happened, and were answered as they have related on the stand? That the boys do not distinctly remember them, is not surprising; for you must have observed that few if any of them were able to recollect what boys were present at the time, and by whom Butler was assisted to Col. Harney's. There are many other particulars in regard to which their memories are conflicting

and imperfect, and I am sure, gentlemen, you are not capable of taking the life of a man on such testimony as this. We pursued the course we did in regard to these boys merely to show that they could not give a perfect and credible statement, and detail the affair as it took place.

All the facts of the case are important as throwing light upon it. If you believe this prisoner guilty as charged, I do not ask you to acquit him. But if you believe that he only performed a justifiable act, it is your solemn duty before God and your country to rescue him from a dishonorable grave. Appeals have been made to your feelings. We sympathize deeply with the unhappy lady you saw on the witness stand; and were I able to reverse the occurrence that has bereaved her, it would be the happiest and proudest act of my life. But the dead are gone, and it is your duty to see that you do the living no wrong.

The most bitter anathemas have been hurled at our witness, Robert J. Ward, Jr. You have been told that he stood here a prejudiced and impeached witness, testifying on his own behalf, and that the halter was even now impending over him. He is not on trial here, but I must say that I consider his detention and confinement without warrant of law, and a wanton restraint on his liberties. Before they can make him criminal, they must prove that he knew it was the prisoner's purpose in visiting the school house, to perform an unlawful act; and according to all the books, they must show that he aided and abetted the fact committed. I put it to your candor, gentlemen, whether he did anything of the kind. It is not consistent with law, to believe a witness unworthy of credit, when he states nothing contrary to reason, and is corroborated as to all the principal facts.

In reviewing the testimony, I will begin with that of this witness, for he was present, saw all the facts, and gives a perfect and connected account of the transaction. Other witnesses give us broken accounts and disconnected circumstances, but he fills all the chasms they leave, and gives a perfect and rational history of the whole matter. In almost every

particular, too, he is corroborated in a wonderful manner by the witnesses for the prosecution. He states that they entered the school house, Matt. first, he second, and Willie last; that Willie went to his seat, while they remained standing; that Matt. sent for Prof. Butler, who came out, and they exchanged salutations. On these facts he is so perfectly sustained by all the other witnesses, that none of them are questioned. He tells you, however, that, while the conversation was going on, Matt. had his hat in his left hand, and was gesticulating with the fingers of his right. They have attempted to controvert this, and show that his right hand was in his pocket during the whole time; but at least two of the other boys agree with Robert, that Matt. held his hat in his left hand. He goes on to relate that the prisoner said: "Mr. Butler, I have called to have a little conversation with you"; and in substance, almost every one of the school boys testifies to the same thing. True, some of them understood the expression to be "a little business," and others, "a little matter to settle"; but they all agree perfectly as to the idea expressed.

The first question which the witness relates, as asked by the prisoner of the deceased, is, "What are your own ideas of justice; which do you think the worse," etc. Now Pirtle, who was unable to hear all the conversation, tells you that he caught the fragment, "ideas of justice." The boys have all testified to hearing the words "little contemptible puppy"; and Robert tells you that they were used by the accused, when he asked his question the second time. The witness also tells you that he asked, "Why did you call my brother a liar?" Now Worthington testifies that he understood him to inquire: "Did you call my brother a liar?" and others make statements to the same effect, though there may be a slight variance in the language. Robert tells you that an explanation was asked and refused; and Knight, as you will remember, states that he heard Butler make use of the language, "I don't feel disposed—" though he did not hear the connection.

And so in every point Robert Ward is so perfectly and clearly corroborated by the witnesses for the prosecution, that

we have every reason to believe he has given a faithful and perfect history of the whole transaction. He heard some things which the others did not, but he was nearer to the parties than any other witness, and in his account of the conversation, the chasms and fissures that they have left, are completely filled up. Worthington, it is true, states that to the question asked of him, Butler replied he would not answer unless he could be permitted to explain; and Robert relates nothing of the kind. Now I wish to say nothing in disparagement of Worthington; but you must bear the fact in mind that he was further from the parties than any other boy who testified here—the distance could not have been less than thirty or forty feet. Now, how is it, if Butler did use the language, that none of their witnesses, several of whom were within from three to ten feet of the spot, heard a single word of it? And under such circumstances I would ask if the witness who relates this, utterly uncorroborated, is more worthy of your credence than Robert Ward, Jr., who is sustained by every one of the school boys who appeared on the stand?

It is a matter of considerable importance in this case, to ascertain who struck the first blow. They have endeavored to prove that it was done by the prisoner, but with what success you have seen. Their first witness on that point is Knight; and he, as you will remember, thought it was struck by Ward, because when his hand was up, he saw it come down with a gesture, and noticed that the distance between them increased. Not to recall your attention to the fact that when this witness first appeared on the stand he detailed all the conversation which took place between Butler and the accused, and then afterwards on cross-examination admitted that he only heard a few desultory sentences; but merely in view of the uncertainty and incoherency of his testimony on this identical point, I would ask if you feel justified in taking the life of a man on such testimony as this?

Their next witness as to this, is Dr. Thomson. Now, I will not imitate the example of some of the counsel for the State in regard to our witnesses, and because he is contradicted,

charge him with perjury. He is a member of the church, seems to be a gentleman, and I presume he is one. I certainly shall not attempt to impeach him, even though he did refuse to state, while giving his testimony, whether he had weapons on his person. But what does he state? That Butler told him Matt Ward had come to the school house and cursed and struck him, that he struck back and was shot. Now you will bear in mind here that this destroys one of their own assumptions, and clearly proves that Butler did strike Ward, leaving only to be ascertained the isolated fact, who struck first.

Professor Yandell, another gentleman of equal respectability and equal character, was on the other side of the wounded man at the moment when this identical statement was made; and he tells you that Butler raised his hand, in representing the conflict after the lie had passed, in such a manner as to lead the witness to believe he wished to convey the impression that Ward had raised his hand in a threatening gesture, and that then he (Butler) had struck him. Now here are two gentlemen, equally credible, and of equal respectability, both witnesses for the prosecution, and I confront the one with the other, and ask if they have not signally failed to prove that the prisoner struck the first blow? On all such equivocal and unsatisfactory testimony, I conceive it your duty to acquit.

As I said before, the first blow cuts an important figure in this case. If it came from the prisoner at the bar, it must be considered a material circumstance against him. But, on the other hand, if Butler struck first, and committed the first assault, and that assault of a severe and violent character, it must tend to exonerate and justify the accused. I humbly conceive we have corroborated Robert Ward on so many material points that you can entertain no doubt of his credibility; and he positively swears that before the shot was fired, Butler seized the prisoner, collared him, run him back to the wall, and was beating him in the face.

A violent assault is equal to a blow. Pirtle tells you that he saw Butler's hands on Ward's shoulders; Pope, that Butler sprang towards him; Campbell, that he saw something in his

manner or movement which convinced him there would be a rencounter; Crawford, that while Butler's right hand was on Ward's shoulder, with his left he seemed to be grasping as if for the pistol; Benedict, that Butler had hold of him and pressed him back, and Quigley, that he pressed him back eight or ten feet against the wall and bent him down. This proves conclusively, I think, by their own witnesses, not only that there was a conflict, but that, in the very language of the law, the prisoner was "driven back to the wall."

The hypothesis that Butler was grasping for the pistol, is completely refuted by the physicians, who state that Butler told them he did not even see who shot him. Let the whole scene appear before you. Here is the prisoner, struggling with a man of twice his power, pressed back against the wall, struck in the face, beaten down towards the earth; the stoutest boy in school is just seizing a pair of tongs, as he says to keep off Robert, but we all know that Robert had done nothing, and the accused must have supposed that he intended to take a part in the rencounter. With that occurrence before him there, pressed down, confined and beaten as he was—however manly and honorable the purpose for which he visited that school house—in the name of high Heaven I ask you, gentlemen, if he had not good reason to apprehend great bodily harm? If you believe he had, it is your duty to acquit him.

We have produced many witnesses here,—witnesses of the highest respectability and the most unquestionable integrity—to show, in addition to all the other proof on the subject, that from the appearance of his countenance, alone, after the occurrence, it was evident the prisoner had been struck. All the presumptions of malice in this case vanish, even before the Commonwealth's own witnesses; and it must be borne in mind that the very contiguity of the parties,—the only fact which caused the fatal result of the shot, was brought about by Butler himself, by the violence of his assault.

I now come to this man Barlow; and it will require but little time to show how signally their attempt to impeach him has failed. He has testified that he saw Butler at Col.



Harney's, after the event, and that in answer to his questions he gave him the clear and reasonable account of it, which he has narrated to you. And how do they attempt to avoid the statement? By contending that Barlow was not at the residence of Col. Harney at all. So they bring Dr. Thomson, who testifies that he did not see him; but tells you that he was busily engaged in his professional duties. Next they introduce Knight, and ask him: "Do you know Barlow?" "Yes." "Did you see him at Col. Harney's?" "No, I did not see him, but I saw another gentleman there, besides the physicians; I know him, his name is Rupeus and he resides in Louisville." Now does it not seem a little singular, gentlemen, that this Mr. Rupeus, who resides in Louisville, the only person present whose mind was unoccupied, and therefore the only one who could impeach Barlow successfully, was not brought here and placed upon the stand? It is not even a question of veracity between Barlow and Dr. Thomson, for the former is corroborated clearly both by our witness, Dr. Caldwell, and by their own, Prof. Yandell.

But in cross-examination, the gentlemen triumphantly tell you, they have shown by this witness the evidence of his own infamy. And how? It is true, they asked him if he had not said this to one man and that to another; and some of the statements he frankly admitted that he had made; yet others he emphatically denied; and they never contradicted him on a single one of the points. And the very men they bring here to impeach him—Mays and Sullivan—testify that within half an hour of this transaction, he met them in the workshop, and while he still participated in the excitement, and his most hostile feelings were enlisted against this prisoner, he told them precisely the same story he has sworn to here. Was there any motive then for him to make false representations? Mrs. Crenshaw, too—you noticed the lady on the stand, and saw that truth beamed from every lineament of her fine countenance—testifies that within two hours after, he gave her the same account of it, with the exception, she does not remember that he spoke of the scuffle. But we have established the



fact, that the parties were clenched, and there was a scuffle, so that is immaterial. Mr. Crenshaw proves the same fact in reference to Barlow—that he made the identical statement to him at the same time. And you will remember, too, that this is the very witness, who, as they contend, was then so much exasperated against this defendant, that he proposed to tear him from the jail by force, and lynch him.

“Ah, but,” says the gentleman, “you are a poor man—a mechanic—and you went to the house of a wealthy gentleman. Yes, you went, and told him a fact of the utmost interest—one that might save his son from disgrace, from degradation, and perhaps from the gallows.” Now is there a single poor man in old Kentucky today, who, being in possession of such a fact, and learning its importance, would conceal it, because the fellow-being whose fate it might determine chanced to be rich? God save me from a wretch so lost to every sense of propriety, so recreant to every principle of honor! I would sooner trust myself to the tender mercies of a hyena than in his hands.

“But he played cards in jail, with this accused. A mechanic sat down to an innocent, social game, with a man nominally rich, and therefore he must be perjured.” Gentlemen, it is either too late or too early, in this community, from such a circumstance to conclude that one who has done this must be a toady or a perjured man. All that this man did was, when he learned that a fact of which he was possessed might have an important bearing on the guilt or innocence of this prisoner, he went as duty told him, and made it known at once. He stands before you as a man of honor, of integrity and of credibility; and never, in the whole course of my experience, have I seen a witness, when an attempt to impeach him was made, so triumphantly sustained and vindicated.

The case, gentlemen, is with you. I have endeavored to consider it in all its bearings, so far as my feeble condition would permit. I have only sought to explain fairly, both the law and the facts. And now, what are you called upon to do? Will you consign this prisoner—this unfortunate, but

noble specimen of young manhood, for the fatal deed of a single hour, to a dark and dishonorable grave? Or, if not, will you inflict upon him that other, but equally terrible punishment? Have you the heart, as he now stands, that fearful, insidious disease preying upon him, with one foot on earth and the other trembling on the brink of eternity, to make him an outcast from the world, and confine him in a felon's prison?

It would be only to lay him on a couch of suffering and disgrace, from which he would never rise again. It would be only to banish him, during the short remnant of his life, from that kind mother, who, with anxious care and fondness, has ever watched over him, the pride of her heart, and the pledge of her first love; from that gentle, devoted young wife, who is bound to him by ties no less mysterious and vital than those which unite the Siamese twins, and the parting of which must lay them side by side, in one early grave.

In the name of that wife, in the name of that mother, in the name of simple justice and of common humanity, I ask you to give him back to life!

*Mr. Wolfe* stated that before the case proceeded further, he desired to call the attention of the Court to a fact which had just come under his notice. It would be remembered that the conditions on which the Court had furnished reporters with seats within the bar were, that no testimony should be published by them until the conclusion of the trial. He held in his hand a copy of a newspaper, whose reporter had accepted the courtesy of the Court, thereby giving a tacit promise to regard the injunction, but which, nevertheless, contained a report of the testimony which had been elicited during several days of this investigation. He alluded to the *Louisville Courier*, and desired to know what action the Court would take on the subject.

The COURT remarked that this was the first intimation it had received of the fact; but that it would hold the matter under consideration until the afternoon session. In the meantime the argument might proceed.

MR. GIBSON, FOR THE COMMONWEALTH.

Gentlemen of the Jury: It has, perhaps, never been the province of a jury in Kentucky, to sit upon a cause of much importance as the one now upon trial. The position of the prisoner in society; the troops of friends that have thronged around him, seemingly determined to rescue him from the consequences of his crime, if human ingenuity, backed by all the appliances that wealth has at command, can effect their purpose; the array of counsel, eighteen I believe in number, though only nine of them are present in court, and among them names long distinguished in the history of this Commonwealth; the host of witnesses on the part of the defense, including a Cabinet officer, two members of Congress, and a score of names scarcely less distinguished—all called ostensibly to prove a fact not disputed—the previous good character of the prisoner; the widespread celebrity that has been given through the press to the cause itself—and the deep enormity of the offense with which the prisoner stands charged; all these give to this trial an interest, such as perhaps no other trial in the west ever possessed.

I feel that I am not merely addressing you, but that I have for an audience millions of freemen, who are watching with breathless interest the result of this trial, and who will hereafter sit in judgment upon your verdict, whatever it may be. There sit the reporters whose pens will send to every state, and county, and town in the whole country, the facts as they have been detailed in evidence before you, and the arguments of counsel to which you have listened, and have yet to listen. The nation will be as well prepared to pass judgment on the case as you now are; and it behooves you, as you value your reputation as men, that you should decide this cause according to the law and the testimony—unaffected by the strong appeals that have been made, and will doubtless hereafter be made, to your sympathies, and unawed by the array of wealth, and talent, and celebrity that has been brought here to fright you from the path of duty.

The learned counsel who has just concluded his very able, very ingenious, and he will permit me to add in all kindness, very sophistical argument in behalf of the prisoner, attempts to account for the appearance of so distinguished an array of counsel, by telling us that the prisoner's friends had learned that the cause was to be prosecuted by Mr. Corwin, of Ohio, and Choate, of Massachusetts. I can sympathize deeply with the learned gentlemen in being disappointed of

"That stern joy that warriors feel  
In foemen worthy of their steel."

But in the meantime, we will try, at least, to give them employment enough to keep their weapons from rusting in the scabbard.

You have heard much in the course of this argument about newspaper publications, and the excitement under which the public mind of Louisville has been laboring in regard to this case. This has been spoken of as if it was criminal in the peaceful and law-abiding citizens of that city, to recoil with horror at the perpetration of such a crime in their midst;—as if it was a monstrous outrage that the newspapers should dare to publish the facts as they were proved on the examining trial, for that is all that is pretended to be charged upon them. It would be strange indeed, gentlemen, if such a man as William H. G. Butler could be shot down, at the post of duty, for no other offense than having faithfully discharged his duty—and while the long line of mourning friends and relatives were bearing him to his grave—while the shrieks of his maniac widow were ringing in their ears—the seventy thousand citizens of that city, to most of whom he was personally known as one of the noblest and gentlest of our race, should have remained as calm and unmoved, as though it had been a strange dog shot down in the streets. The horror with which the deed was viewed owed not its birth to newspaper publications. Never did the excitement in that city run higher than at the examining trial, amid the crowd which thronged every avenue to the Police Court; and that was before the publications were made. But that those publications were the truth, and nothing but

the truth, you have abundant evidence in the fact that, though the same witnesses were brought here, and sworn before you, whose testimony was published in the newspapers, no pretence is made by the defense, that they have in the slightest particular deviated here from the statements made there. It only amounts then to this, that the citizens of Louisville have human hearts within their bosoms—that they are not stocks and stones, but men—and that there are at least two newspapers there that have independence enough to do that, where a wealthy criminal is concerned, that all newspapers do every day, when any poor friendless wretch steals a horse or passes a counterfeit bill. If it is wrong to publish the details of crime, why has no wise legislator introduced a bill prohibiting such publications? How many voters, think ye, such a law would receive in any legislative body of freemen? Or what man, after voting for it, would ever dare again to look into the honest faces of his constituents.

We are told, too, that so fierce had become the excitement in Louisville, that this prisoner was forced to come to Hardin County for justice. This is a matter, gentlemen, that I should have considered it improper for me to allude to, if it had not been thrown for effect by Mr. Marshall. Does it not strike you as strange—passing strange—that this young gentleman who is so endeared to everybody in Louisville, by his amiable, gentle, kind, and conciliating disposition, as sworn to by a host of witnesses; this gentleman, with whom, or of whom Brother Sehon has had such “hopeful conversations,” is it not strange, I say, that he should have to fly from the spot of his birth—from the home where he was so surrounded by these numerous, and wealthy, and influential friends, to avoid injustice?

But these are considerations that should have no influence with you—certainly the fact that the neighbors and acquaintances of the prisoner, with whom and among whom he has lived all his life, believe him guilty, can furnish no testimony of his innocence; and yet, the information of that fact has been volunteered before you by his counsel, as though they thought it matter entitled to weight in his favor.

With what holy horror they would have raised their hands if we had gravely told you that everybody in Louisville believed the prisoner guilty. It is a consideration, gentlemen, which should have no weight with you in arriving at a conclusion of his guilt, but if it should so influence your minds, he will at least have his own counsel to thank for it.

You have already heard something, and will doubtless hear more before the argument closes, about the employment of private prosecutors, and perhaps I had as well dispose of that subject before entering upon the merits of the cause as developed in the testimony. It is, however, rather a matter personal to the counsel employed, than one having any legitimate bearing upon the issue which you are sworn to try. As a general rule, I would decline an employment to prosecute—I would certainly never be employed in any case where my convictions of the guilt of the prisoner were not so strong and clear as to leave no shadow of doubt upon my mind. That guilt, too, must be something more than a mere legal guilt—a guilt presenting no extenuating circumstances outside of a legal defense. But on the other hand, there are cases which every consideration of professional pride and duty forbid a lawyer to decline. The circumstances of this case are peculiar. The prisoner is not alone upon trial—the fair name of William H. G. Butler is involved in the issue.

Had he done aught to deserve the death he received at the hands of the prisoner? Above all, did he die with a lie upon his lips? A verdict of acquittal in this case must answer these questions in the affirmative; and his surviving relatives would be recreant to his memory, if they neglected any means necessary and proper to secure a fair and impartial trial of this case. If it be right for them to employ counsel, it cannot be wrong for counsel to accept the employment. And if from the unheard of array of counsel for the defense, and the untiring efforts of the numerous and wealthy friends of the prisoner, the relatives of his victim have reason, as they conceive they have, to fear, that guilt may escape punishment; surely every consideration of duty to the dead—to his stricken

widow and helpless babe, would dictate—that to some extent these efforts on the part of the prisoner's friends, should be met with corresponding efforts on the part of those whose sacred duty it is to guard the memory of him who can no longer protect his own fair name from reproach.

Had this have been the "brave and manly crime" that Mr. Marshall has pronounced it; had the prisoner met the deceased in fair and open fight, warned and armed, I would never have consented to appear in the prosecution. Had he done this, or had he offered him one of the pistols he wore, and thus placed his victim on a footing of equality with himself, he could at least have stood up before a jury of his countrymen and said, "I placed my own life upon the issue—I played boldly for the stake, and I won; murderer though I may be in law, it was no coward deed." Such a man no considerations could induce me to prosecute.

But when the assassination has no one redeeming feature about it, either in the causes which led to it, or in the manner of its perpetration; when the victim is an unarmed and unsuspecting man, and that man a cripple, deprived even of the ordinary means of defense common to all; and withal, one of the most peaceful, amiable, and gentle of men. When such a man has been so ruthlessly stricken down, for having faithfully and honorably discharged his duty, and I am appealed to on behalf of his heart-broken widow and mourning brothers; when even the wail of his helpless babe seems to cry for justice for its father's blood, I should despise myself if any considerations could for a moment cause me to shrink from what I consider the path of duty.

Before entering upon an analysis of the testimony in the cause, permit me, gentlemen, to call your attention to a few plain and incontrovertible principles of law, upon which, as I conceive, this case must rest.

I lay down these principles under the eye of the Court, and shall read you ample authorities sustaining them.

First. If a man seeks a fight, by giving a gross insult or striking a blow to bring it on, and in the fight kills his adver-

sary, with a deadly weapon previously prepared, when his own life is in no danger, he is guilty of murder, no matter who struck the first blow.

Second. If a man provokes a fight, and in the fight is over-matched, and kills his adversary, it will be manslaughter, even if his own life is in danger.

Third. Unless the defendant had no other means of saving his life, or his person from great bodily harm, he has been guilty of manslaughter, even though there is no evidence of premeditated malice.

These are the principles which I conceive must govern you in the verdict you will render, after applying them to the facts developed in the testimony. In commenting upon the testimony, I propose to consider it in two aspects.

First. The case as confessed on the part of the prisoner and admitted in argument by his counsel.

Second. The facts as they are presented by the whole evidence in the cause, as well that of the Commonwealth as that of the defense.

I set out, then, with the assertion, that taking the facts just as the defense claim them to be, in every particular, and applying the law to them, the prisoner is guilty of murder, if you shall think his life was in no danger, and guilty of manslaughter, if his life was in danger at the moment he fired.

To sustain this position of law and fact, I assume the facts to be as shown from the testimony of the defense, coupled with the testimony of Gilmore, that is not controverted. 1st. That ill feeling toward the deceased existed in the breast of the prisoner as early as the day before the murder. 2nd. That in consequence of that ill feeling, and with a view to an anticipated difficulty, the prisoner, within less than two hours before he shot the deceased, purchased a pair of pistols, had them loaded at the shop, and carried them with him, concealed, to the place where he met the deceased. 3d. That he went there so armed, intending to provoke a fight with Butler, and in that fight to kill his adversary. 4th. That on meeting Butler in the school room, he did everything that man could do, to



provoke a fight, and when stricken, and unhurt, and before he had tested their relative strength, shot Butler with one of the pistols previously prepared. 5th. That there existed no necessity for the act at the moment when it was committed.

These facts I propose to establish from the evidence produced on the part of the defense, coupled with the uncontroverted testimony of Gilmore. If I should succeed in establishing the whole of the five propositions, an application of the law I have read, to them, pronounces this prisoner guilty of murder. If, however, on the last proposition you should differ with me, and believe that his life was in danger, then, the first four propositions being true, he is guilty of manslaughter.

*My first proposition is, that ill-feeling existed in the bosom of the deceased towards the prisoner, and that the difficulty did not arise upon a sudden quarrel.* It is hardly necessary to labor this point. His statements to his father and mother, and his conversation with his brother on the way to the school house, abundantly establish the fact, and if further evidence is wanting it is conclusively furnished by his conduct and language towards Butler in the school room. Certainly there was nothing said or done by Butler during the interview, to call for or account for, the abuse and insults which were heaped upon him by the prisoner; and we are forced irresistibly to the conclusion, that they were the result of personal ill-feeling. If this proposition is not established, then human testimony can establish nothing.

*My second proposition is, that with this feeling rankling in his bosom, and just before he went to the school room, he armed himself with deadly weapons, with a view to the interview.* The purchase of the pistols is not disputed, but we are told in explanation of the act, that it is customary to carry weapons in Louisville—that the prisoner was going south, and last and strangest of all, that he purchased the smallest pistols in the shop—mere “pop-guns,” as the counsel call them: playthings, fit only for children to amuse themselves with, and that consequently he could not have intended them for the fatal purpose

they accomplished. Let us examine separately these three different, and as I shall show utterly inconsistent, explanations: Has a general custom of carrying weapons in Louisville been proved? For the honor and credit of that city I am proud to say, that the reverse has been established. Mr. Prentice tells you that the persons who habitually—mark the word—who habitually carry arms there, are few in number, but that persons expecting a difficulty usually arm themselves. He adds that he has known persons arm themselves without any intention of committing murder; but it would perhaps be difficult for him to explain how he could possibly know with what intention the arms were worn. I submit to you, gentlemen, that the custom as proved, so far from showing that these pistols were not purchased with a view to the use afterwards made of them, furnishes very strong evidence, from which to draw just the opposite conclusion.

But he was going south. He was to be a traveler on steamboats, exposed to robbers; he was going to Arkansas, somewhat celebrated in times past for deeds of daring violence and desperate combats. But let me ask you, if such a pistol as that exhibited in evidence, is the weapon a man would select to defend himself from the bowie knife or the revolver of a desperado? Of what use would it be in a street fight? The best shot in the state could not be certain of hitting a man with it at six feet distance. No, gentlemen, it is fit for no such use—it was purchased for no such use. It is emphatically an assassin's weapon; easily concealed, it is fit only for the purpose to which it was applied in this case—to be placed against the breast of an unsuspecting man, and fired with deadly effect. But with an utter recklessness of all consistency, counsel tell us that this weapon, that they say he had purchased to defend himself amid the dangers of southern travel, and from the bears and panthers of Arkansas, is utterly inefficient—a mere plaything, a pop-gun, that never was meant to execute any deadly purpose. If he thought it so harmless, why did he buy it? If he deemed it not deadly enough to slay the peaceful cripple in his school room, could he at the same time

think it sufficient to defend him against the armed desperado, or the midnight robber? Their own arguments recoil upon them. The peaceable and quiet disposition of the prisoner—the fact that it is only usual to carry weapons in Louisville when a difficulty is expected—the nature of the weapon itself, just suited to the use made of it, and useless for all other purposes—all prove that the weapons were purchased to kill Butler with, and for no other purpose.

But there are other facts connected with the purchase worthy of being noticed in this connection—he purchased no ammunition. If he had bought the pistols to take south with him, he would have needed powder, ball and caps, as much as he needed the weapons themselves. There is no man of his age and intelligence in the west, who does not know that a pistol to be at all reliable, must be discharged and reloaded at least once in every ten or twelve days. But he purchased no ammunition—he did not need it, for the purpose he had in view. He first buys one pistol, and has it loaded, when he takes out the money to pay for it, he pauses, hesitates, and inquires the price of the pair—can you read his thoughts, gentlemen, during that moment of deliberation? He had prepared himself for Butler, but Bob was not yet back from Cincinnati with his bowie-knife; perhaps Sturgus might be there, or some of those little boys roused at the sight of their beloved teacher's blood might become dangerous—he might have to shoot little Pirtle or Benedict—and so the second pistol was purchased and loaded; and so armed he starts upon his mission of blood. There is no room for a shadow of doubt on this point—the pistols were bought with a view to the intended interview with Butler and for no other purpose. Thus far our way is clear. Ill-feeling towards the deceased exists—an interview is expected—and the pistols were bought and loaded with a view to the interview.

I come now to the third proposition, that I seek to establish : *That the prisoner sought the deceased, with deadly weapons concealed upon his person, intending to provoke a fight, and in such fight kill his adversary.* To prove this I call to the stand

the father, the mother, and the brother, and accomplice of the prisoner. Their own witnesses, sworn by them, and whose testimony they will not dispute. That the prisoner sought the deceased, and that he wore deadly weapons concealed upon his person is not controverted by his counsel. Did he expect a difficulty, and did he intend to provoke it? Why say to his father, "I am a young man, and it is proper that I should go," if he did not expect a difficulty—why those admonitions of his mother to be calm—why did he say to his brother as they went to the school room, "Don't interfere by word or action, unless they both attack me"? There is but one answer to all these questions. He went there expecting a difficulty. Suppose a stranger had been walking behind them on the street, and heard the remark, what would he have inferred? Most certainly that the speaker was expecting an attack. The preparations that he had made—his conversation with his father—the injunctions of his mother, and his own conversations on the way, are of themselves sufficient to establish the fact—but if to them we add the ill-feeling he entertained toward the deceased, and the whole scope of his words and manner after he entered the school room, the evidence becomes wholly irresistible. But did he intend to provoke the difficulty himself? I say there is nothing clearer from the testimony, than that such were his intentions. He had enmity towards Butler, but there is no pretence that Butler cherished any unkind feelings towards him. Then he had a motive to provoke a fight. Butler had none; and men never act without motives. Butler was a "just man and a gentleman," the prisoner himself said to his father. Surely he could not expect an attack from such a man unless he provoked it. But I have shown that he did expect an attack, and therefore he must have intended to provoke. Men's intentions can only be safely judged of by their actions, and judging the prisoner's intentions on this head by his actions after he entered the school room, no doubt can exist in any rational mind that he went to the school room, armed with weapons prepared for the difficulty, he was intending to bring on. But did he intend killing his adver-

sary? For what other purpose were the pistols purchased? Did he intend to frighten Butler with his weapons? If so, why hide them till the very moment of their use? Did he intend only to wound or cripple him? If so, why aim at his heart? Were they purchased to be used only as a last resort, when all other means of escape or defense had failed? No; for he used them at the very outset of the encounter, before he was himself more injured than he might have been by "the rubbing of a coarse towel," according to one of his own witnesses; and before he had tested the relative strength of himself and his victim. Did he intend to fight Butler a fair fight, were his intentions changed after he found himself engaged? If so, why had he the pistols there, and knowing he was not the equal of Butler in strength, why tell Bob not to interfere, if he did not intend to use his pistols? It is likely that he went there intending to take a whipping from Butler? Certainly not. But he knew Butler could whip him, and yet he directs Bob not to interfere. The inference is irresistible, that he intended to do just what he did do—shoot down his victim the very moment the difficulty provoked by himself commenced. Have I not thus far, gentlemen, truly represented the facts, and are not the conclusions I have drawn from them, clear and unassailable? The existence of the grudge, the preparation to avenge it—the going to seek the victim armed with deadly weapons, the intention to provoke a difficulty, and in the melee to kill his adversary, are, it seems to me, as clearly deducible from the facts proved by the defense themselves, as intentions ever can be deducible from deeds.

*My fourth proposition is, that on meeting Butler in the school room, Ward did everything that man could do to provoke a fight; and when by his goading insults he had succeeded in so doing, while yet unhurt himself, and in no danger of life, or even bodily harm, he shot his adversary. And bear in mind, gentlemen, that I am now looking only to the prisoner's own testimony to support me in the positions I am endeavoring to establish.*

What says the prisoner on entering the room, Bob being

the witness?—"I want to have some private conversation with you." Was the public school room, in the presence of forty boys, an appropriate place for private conversation? No; and Mr. Butler promptly requested him to walk into his private room. This Ward refused to do, and proceeded, in the presence of the whole school, to ask a question which was in itself an insult. Mr. Butler declines being interrogated. The question is repeated in a still more insulting form:—"Which is the meanest, the contemptible pup who begged chestnuts of my brother and then lied about it, or my brother who gave them to him?" Mr. Butler answers: "There is no such boy in my school." Can a milder and, at the same time, more appropriate answer be conceived? Then comes the next question, or rather, demand:—"You have called my brother a liar, and must apologize!" Must! Was Butler a slave that Ward should address him in the language of a master? Is life so dear that it is worth purchasing at the price of submission to an imperious demand like this? And who is the prisoner at the bar, that he should thus lord it over one his equal in everything but wealth? Were William Butler brother of mine, I would rather—a thousand times rather—that he were sleeping in his bloody grave, with no stain upon his fair name, than have him living and dishonored by submission, such as was demanded of him there. He gave the only answer he could give without dishonor: "I have no apology to make." Now, mark the deliberation which indicates a settled malice:—"Then you must hear what I have to say to you: you are a d—d scoundrel and a coward." Did man ever use such language in Kentucky, and not expect to be struck? Did Ward not expect it? Had he not prepared himself for that moment? Bob says he was struck twice and pushed back against the door; which same door, he admits a moment afterwards, was open; and then the deed was done—a widow and an orphan was made—a young man in the first flush of manhood, just entering upon life's battle, with all life's hopes before him, was shot down like a dog, without the remotest chance being given him to defend his life. Two pistols in the assassin's

hands, and if by a miracle he should be able to escape them and get the better of his antagonist, there stood the brother, with the murderous bowie-knife, ready to stab him in the back if necessary. He had no chance—none, none, none! Their plans were too well laid—too coolly carried out—to leave him the shadow of a chance for life.

I have, I think, thus shown that he carried out, coolly and deliberately, the intentions with which he came to the school room; that he deliberately provoked the encounter, and as deliberately shot his antagonist as soon as the affray commenced, without waiting till he was overpowered.

I come now to the last point which I proposed to establish, and upon which turns the question whether he is guilty of murder or manslaughter. *If he was in danger of life or great bodily harm at the moment of firing, he is guilty only of manslaughter, notwithstanding he provoked the difficulty; if no such danger existed, he is guilty of murder.*

Was he in danger of his life, or even of great bodily harm? Butler had no weapon with which to inflict either, and well the prisoner knew it. And was not his brother at hand to interfere and save him? No, gentlemen, he was in no danger, and no man knew that better than he did himself. He knew Butler's nature well; knew him to be a man who would not "needlessly set his foot upon a worm." What marks of violence upon his person attest the force of the blows he had received? Was it the towel mark upon his cheek, that no witness ever saw or noticed until it was pointed out to him by the prisoner? If it was the effect of a blow, it must have been such a blow as a lover would inflict upon his ladylove with a rose. Look at that skin, more fair and delicate and effeminate than that of half the females of the country, and tell me, then, if it could possibly have been more than a mere touch that produced an effect so slight? But his mother tells us, his eye was watering. Let us in charity, gentlemen, hope that he was shedding a single tear over the writhing and anguished victim he had just left weltering in his blood; that one thought of the happy little home he had broken up forever—one half-



formed regret for the widowed heart and orphaned babe his hand had just made—were struggling for existence in his heart, even while enjoying his proud triumph of having slain an unarmed and defenseless cripple, without having incurred the slightest danger himself. Danger! He was in no more danger than if he had lain behind a log in the woods, and shot his victim in the back as he passed—and he knew it. And if there was no danger, then the deed is murder—cold-blooded, deliberate, calculating, safe murder.

I have thus shown you, gentlemen, from the confessed case on the part of the prisoner—from the very facts set up by the defense themselves, that ill-feeling existed in the breast of the prisoner toward the deceased; that intending to have a hostile interview with the deceased, he armed himself with deadly weapons, procured for the particular occasion—that so armed he went to the school room of the deceased, intending to provoke a fight, and in the fight to shoot his victim;—that he carried out with marked deliberation the intention thus formed—that he did provoke a fight, and, as soon as it commenced, before he was worsted or overpowered; before he had tested the relative strength of himself and his adversary, and when he was in no danger; his armed brother near, and no other enemy in sight, he shot the man whom he went there determined to shoot, in the event he would not submit to be disgraced in the presence of his whole school.

Apply the law, as I have read it to you, to these facts, and if you are honest men, understanding the value of the oath you have taken, his guilt will be as clear to your minds as though God's own hand had written upon his brow the verdict that he stamped on Cain's.

I have thus far, gentlemen, kept out of view the evidence on the part of the Commonwealth. I have taken the case just as the defense claim it to exist, and I think I have shown you that the prisoner stands before you guilty, by confession.

Let us now look at the overwhelming mass of testimony on the part of the Commonwealth—testimony that sweeps away even the broken reeds upon which the defense has sought to



lean, and exhibits this crime in naked deformity before you. Before entering upon an analysis of the evidence adduced on the part of the Commonwealth, let us for a moment glance at the nature, character and position of the witnesses by whom we have proved our case. They are boys; honest, manly, open-hearted boys, whose countenances alone would win them credit in a land of strangers. Boys, old enough to see and understand and remember facts, but too young to have been contaminated by intercourse with the world; too honest to speak falsehood, too guileless to conceal the truth, no traces of concert in their stories, and yet no contradictions. The man who would doubt their truth, under all the circumstances, ought to be forbidden by law ever to be a father.

Look, gentlemen, upon this map (exhibiting a diagram) and note the position of each boy, and compare it with the story that he tells, and you will perceive that each one saw, just what he might have been expected to see from his position, and that not one of them relates any part of the transaction that he could not have seen, situated as he was relatively to the parties. You have been told by learned counsel, however, that it is something very strange that some of the boys nearest to the parties did not hear the conversation, while others farther off detail it at length. I can see nothing in this, gentlemen, not easily explained by the ordinary every day experience of our lives. Did you never sit with a book or a newspaper in your hand, while conversation was going on around you, so that though you heard the sound, you heeded not the sense of what you heard? Have you never gone to church when you had something that was anxiously occupying your mind, and sat the sermon through, and when you went home, had no more remembrance of text or sermon, than if you had been asleep in the woods? These boys were engaged on their various tasks;—some reading, some cyphering, some writing; and it is one of the circumstances that stamps their evidence with the unmistakable marks of truth, that, while some heard the whole conversation, some heard only detached sentences, and others none of it, there is yet no contradiction

among them in any essential particular. Their evidence is in accordance with the nature of their position, and the pursuits they were engaged in for the moment, and for that reason, if no other existed, it would be entitled to your fullest confidence.

Never, perhaps, did attempts to impeach witnesses encounter more signal failure. So hopelessly has it failed, that counsel, with a boldness that in a better cause would be worthy of admiration, now deny that they have attempted to impeach them at all. I will never complain of attempts to impeach a witness, where any ground exists to base the attempt upon. But to attempt to confuse a witness, by intimating to him that he has told a different story out of court, and asking him if he has not told this or that man such a story, when the counsel know that they have no evidence that he has, would be a most unfair course toward a man of good character. It certainly acquires no additional merit from being practiced on boys. Do you not remember that young Knight was asked if he had not told Dr. Caspari a different story from the one he told here upon the witness stand? The counsel who asked the question, must have known whether Dr. Caspari would swear that he had, and yet, when Caspari was on the stand, afterward, as their witness, they never mention Knight's name to him. So they ask Worthington if he had not told his mother something different from his statement here. He denies it, and yet they do not attempt to contradict him. They ask Minor Pope if he had not made a different statement at the examining trial. They knew that he had not, for the minutes of that examination were before them when they asked the question, and if he had done so, they would have proved it before they closed their case. Again, they attempt to impeach Benedict, by some man whose name I can't pronounce, who tells you in a kind of oracular style, that if he once sees and speaks to a man, he never forgets him, and in the next breath admits that he cannot recognize a single one of the boys he saw at the door. He tells you he met a boy in the street, crying, and going up Chestnut street, who said Butler

struck first, and that he thinks he has seen the boy here, with a black roundabout and white hat on. Benedict was brought in, and he says he thinks he is the boy. But Benedict has no black roundabout on, and has not had one on since he has been here. Besides, Benedict went down Chestnut street, and could not possibly have been the boy this witness met. They ask Worthington if he did not tell Mr. Allen, at the school house door, that Butler struck first. He says he has no recollection of seeing Allen there, and is very sure he never made such a statement. They call Mr. Allen to the stand, a very cautious and honest witness, with the air and manners of a gentleman, and what does he say: that he went to the door and shook hands with Worthington; that he asked if Butler had gone; the boys said he had; that he then asked the particulars, and received divers statements from different boys; and that to some one of the answers to some one of the questions given by the other boys, he thinks Worthington nodded assent, but to what answer it was, he is utterly unable to tell. So much for the attempt to impeach Worthington. It needs no comment. And little Pirtle, with his honest, open, manly countenance, with truth written all over it, could not escape them; they bring a little boy named Judt, who says Pirtle told him that Butler struck first. Now Pirtle has never pretended to know anything about the striking, for he was not looking at them, and if he ever did say anything to Judt about it, he was only telling what he had heard. But Pirtle says he never told Judt so, and I am satisfied that the little boy, Judt, is mistaken, and has confounded some of the numerous conversations he has most likely had with other boys on the subject, and has erroneously got the impression that it was Pirtle who told him so. And yet, after all these efforts, gentlemen tell us they are not attempting to impeach the boys, and affect a virtuous indignation, that we should defend those, whom they say, are not attacked. If they say they have not impeached them, I most cordially concur with them, but when they deny the attempt, they will pardon me if I differ in

opinion with them, as to what constitutes an attempt to impeach a witness.

But the testimony of the boys stands not alone. It is corroborated by the dying declarations of the victim. Butler himself, standing upon the very portals of the grave; knowing that in a few short hours he must stand in the presence of his God; when all earthly hope had deserted him—hope! man's earliest, last and truest friend, hope, that gilds the darkest cloud that lowers upon life's future—that lights up the gloomiest path that humanity is destined to tread,—that stands by our cradle in infancy, plays with us in boyhood, sustains us in the stern conflicts of manhood, sits with us by the fireside through the wintry hours of age, and when life's battle is over, gilds even the grave with its glorious sunlight—hope had deserted him. All earthly feelings were dead within that fainting heart—All! no, not all, not all. Love, undying love, immortal as the soul itself, still lived and reigned supreme. No thought of himself, no expression of the deep agony that was writhing his frame, no word of anger or reproach for his slayer—"my poor wife, my poor child." Those words, at such a moment speak the character of the man, in language more impressive and convincing than would have been the testimony of an entire Cabinet and Congress. Can it be possible, that such a man, at such a moment, with no motive to falsehood, could have spoken untruly? Will you give the weight of a feather to the testimony of a thousand such witnesses as Bob Ward, swearing the halter from around his own neck, and contradicted by a host of other witnesses? Will you weigh it all against the declaration of that dying man? You will not, you cannot, you dare not. If you have human hearts within your bosoms, they would revolt at the bare thought of such treason to humanity. If you are men, living, breathing men, with souls to be saved or damned, reasoning like other men, you will be forced to believe the statements made by Butler, whether you will or no; you cannot doubt their truth. Let us then, calmly and dispassionately examine the testimony as to those statements, and compare and analyze

it, and see if we can arrive at a certain conclusion as to what the statement really was. Dr. Thomson says, and I give his statement in his own language from my notes, "I asked him what their position was—he said they were clinched—that they had had some conversation—that Ward called him a d—d scoundrel and struck him, and he struck back, and he received a shot, but did not see who shot him." Yandell and Caldwell were both present at the time the declaration was made, but neither of them seem to have any very definite recollection of the language used by Butler. Thomson asked the question, and it is natural to suppose he would remember the answer. The other two were engaged in an examination of the wound, with their thoughts directed to it, and not to the conversation of the patient. It is natural that they should have no connected recollection of it; and such we find to be the case. Dr. Thomson, the man most likely to remember it distinctly, does so remember it. Yandell, and Caldwell, who were not likely to have a clear and distinct memory of the words, or even of their general import, tell you themselves that they have not; Caldwell tells you he cannot give the words Butler used, that the idea he expressed was that he and Ward were engaged at the moment of the shot. This is certainly in exact accordance with Thomson's statement. He tells you further that Butler said he did not see who shot him. Thus both Thomson and Caldwell contradict Barlow, who says Butler said that "Ward threw his hand around and shot him." Yandell says that Butler said that Ward raised his hand, and commenced an attack, or something like that, he could not say positively what. Just such a recollection as might be impressed upon an inattentive listener by the very language that Thomson has detailed; and not only is there no conflict between the physicians, but Thomson is most clearly confirmed by the other two, to the extent that their recollection goes.

But, Barlow! Barlow, they say, contradicts them, and at the same time is confirmed by them all. Very kind, indeed, in Drs. Thomson, Yandell and Caldwell to confirm Barlow, at

the same time that Barlow is contradicting them; and to most men the two things would seem rather inconsistent, not to say impossible. But according to Barlow's own showing, neither Yandell nor Caldwell were in the room. Can you believe then, on Barlow's evidence, that the dying Butler made two different and contradictory statements about the transaction, within five minutes of each other? Yet you are forced to believe it, if you do not reject Barlow's testimony altogether. I have no desire to rake this man up from the depths of infamy to which the scathing analysis of his testimony, by my associate counsel, has consigned him. Nor should I have alluded to him, but for the bold assertion of my friend, Gov. Helm, that he had been confirmed by Yandell and Caldwell. I will try, and if possible, avoid even the mention of his name hereafter. Let the dead rest. But we are told by counsel that Butler's declaration contradicts the boys; that Butler admits that he did strike Ward after being himself stricken, while not one of the boys remember anything of the kind. As much stress has been laid upon this point by the counsel who preceded me, it may perhaps be worthy of a moment's examination here. My belief is that the laying his right hand on Ward's shoulder, is the act which Butler spoke of as a blow. To some extent it may be regarded as a blow, though given with the open hand. It would perhaps be very difficult to define the exact boundaries between a push and a blow; and I think the fair inference is, that Butler has designated as a blow, the same act that the boys have described in other language. But, suppose I am mistaken in this. What more natural and easy than that the boys might see the first blow, and yet fail utterly to see who struck the second? If you ever witnessed a fight (and I think I may safely take it for granted that you have), you know well that it is easy for you to remember everything up to the first blow; but after that everything is confused, and no man can keep the run of the fight. The astonishment of the boys at seeing their teacher stricken, would naturally confuse and alarm them, and it is perfectly

natural that they should not have observed the events that followed close upon the heels of that blow.

This leads me naturally to another point made by the defense. Counsel tell us that these boys were too much alarmed and excited to notice accurately, and remember correctly, the occurrences they witnessed. When did that excitement and alarm begin? Not until the shot was fired; up to that moment they were neither alarmed or excited. There had been nothing to alarm, nothing to excite them; and all their testimony having any bearing upon the case, relates to facts occurring before the shot, when they were entirely cool and collected—so much so that some of them paid no attention to the conversation till the words “d—d liar” and “scoundrel,” attracted their attention. This ground of objection then to the reliability of their testimony, has no foundation in the facts of the case. We know that alarm and excitement renders us less likely to be accurate observers of events; but it never wipes out the memory of facts observed and noted in cooler and calmer moments. It accounts for Worthington’s not remembering to have seen Allen come to the door. It might account for many discrepancies and contradictions occurring in the testimony, as to the facts after the shooting, if any such discrepancies existed; but it cannot throw any cloud of doubt upon their relation of events that occurred in their presence, and before either alarm or excitement had disturbed their minds.

Having thus briefly disposed of the attempts made to impeach the testimony of the boys, let us see what facts are proven, who proved by, and what opportunity the witness who proves the fact had of witnessing what he swears to.

When the Wards entered, Matt. said to Butler, “I have a matter to settle with you.” This is proved by Knight, Pope, Campbell, Crawford, and Redding, and in it they contradict Bob, while not one of the boys give the same statement about it that Bob does. This, I suppose, is one of the points in which counsel say that Bob is confirmed by the other boys. A strange sort of confirmation.



The next thing that Ward said, was the question relative to the chestnuts. This is proved by every boy who heard anything of the conversation. They all agree that it was asked but once, and that the word "contemptible" was used. Bob says it was asked twice, and denies that the word contemptible was used. This, I suppose, is another "confirmation."

Butler, in reply to the question, said if Ward would go into his room with him, he would give him a satisfactory explanation. Worthington, Pirtle, Pope, Crawford, and Redding, all swear to this. Bob says that the answer was, "There is no such boy in my school." Another confirmation of Bob, I suppose, though not another soul in the house but himself heard any such words. And here let me pause to make a single remark. From the first opening of the testimony, the defense seemed extremely anxious to establish that there were no boys in Butler's room. We of the prosecution were somewhat mystified by this. We could not imagine what conclusion they proposed to draw from it, if it should prove to be so, unless that they would gravely ask you to believe that Butler wanted to lure the Wards in there and murder them both. But Mr. Marshall clears up the mystery. He says that if the prisoner had gone to the school room intending to murder Butler, then he would have accepted his invitation, and done the deed in the privacy of that room, where there were none to bear testimony against him. Unfortunately for this very novel position, the facts show that there was a class in the room. Besides, we do not contend or believe that Ward went there with the fixed design of murdering Butler at all events. His fixed purpose was that Butler should either degrade himself by making a cowardly apology at his imperious command, or, refusing to do this, that he, Ward, would insult and strike him. If he bore all this without resentment, in the presence of his school, then he would leave him a life, no longer worth preserving; if he dared to resent either insult or blow, then his purpose was to slay him. That is the view we take of his intentions; and his refusal to go into the room is at once



accounted for; the whole school would not be witnesses of their teacher's degradation.

All the boys testify that Ward refused to go into the room, and Worthington swears he said "he did not come for an explanation."

I come now to a most important fact—Knight, Benedict, Pope, and Crawford, all swear that Ward had his right hand in his pocket when he entered the room, and kept it there till he drew the pistol and fired. Another confirmation of Bob you will perceive, who swears he did not have it in his pocket either when he came in or during the conversation. Look now, gentlemen, at the positions on the diagram of these four boys, and you will see that each one of them could have readily seen the fact he testifies to. Knight noticed it from the window in Sturgus' room as he entered the gate, and having been as he tells you, told by young Victor Ward, that Matt. was coming around to "give Butler hell," he hastened into the large room and saw the prisoner enter with his hand still in his pocket. But we are told that it is very unlikely that these boys should have noticed the position of his hands. I cannot see it in that light; the position of his hands was an extraordinary one; his coat drawn up to let his hand in his pocket; and it kept there all the time of the conversation, was an incident likely to attract the attention of any one. If we add to this the fact that the boys from their knowledge of what Victor had said, from the fact that half an hour before a servant had been sent for Victor and his books, and from all the attendant circumstances were expecting a difficulty, you will perceive that there is nothing extraordinary in their having noticed the position of the prisoner's right hand on entering the room.

But to return to the order of events from which I have digressed to notice this fact relative to the position of the prisoner's right hand. I have shown that the prisoner entered—his right hand in his pocket—that his first words were, "I have a matter to settle with you"; and followed it up by an insulting question—that he was invited by Butler to walk

into a private room to listen to an explanation, but declined, saying "he did not come for an explanation."

I now proceed with events in their order. The next question propounded by the prisoner was, "Why did you call my brother a liar?" This is proved by Knight, Worthington, Pope, and Crawford; Bob states it entirely different, which is confirmation number five, I believe.

Worthington proves Butler's reply: "I cannot answer unless I am allowed to explain." But these gentlemen who say they have made no attempt to impeach these boys, say that it is very strange, indeed, that Worthington should have heard so much of the conversation while he was so far off, and that others who were nearer did not hear it; and by way of making it still stranger, they very coolly double the distance at which he really was. Mr. Marshall tells you that he was forty feet distant. Look at the diagram, gentlemen, just seven benches separated him from the parties, and these benches are three feet apart; he was not at the utmost more than twenty-five feet distant, certainly near enough to have heard even low tones of conversation, if he was paying attention, while those who were nearer, though they doubtless heard, heeded not, and consequently do not remember. He swears positively that he both heard and noticed—gentlemen say they do not mean to impeach his veracity, and therefore, of course, they must believe him.

And when this mild—too mild by far—answer was given. what next? "You are a d—d liar and scoundrel!" This is proved by Knight, Campbell, and Redding. Bob not willing to agree with anybody about anything, substitutes the word "coward" instead of "scoundrel." That this insulting language was immediately followed by a blow, is proved by Knight, and by the dying declarations of Butler.

That there was a scuffle, and that Butler had his crippled hand on Ward's shoulder when he was shot, and that he was some four or five feet from the door at the time, is conclusively proved by Knight, Pirtle, Crawford, Benedict and Quigley. It is true that Quigley at first said Ward was pushed back to

or towards the door, but he afterwards stated that he did not see Butler step forward, and that Ward only stepped back one step, and was four or five feet from the door when he shot. And here comes in another fact, proved only by Crawford, who was the only witness in a fair position to notice it. When Butler had his right hand on Ward's shoulder, he was grasping with his left for Ward's right hand. Look at the map again, gentlemen, and you will at once perceive why it was this incident was not noticed by any of the other boys. Crawford was just in the position to observe it, the others were not. But we are told that this is inconsistent with Butler's statement—that he did not see who shot him. I suppose, then, that gentlemen abandon Barlow to his fate, for Barlow says Butler did see who shot him. I hope they will permit me to congratulate them upon having buried their dead out of their sight. But there is no inconsistency; Butler may have seen his hand in his pocket, and suspecting that it grasped a weapon, may have, and doubtless did, try to grasp his arm, and yet not have seen the weapon when it was drawn. He did not see it; he said he did not, and I would believe William Butler's dying words, though an angel should contradict them.

I have thus gone through with events, in their order, up to the commission of the fatal deed. I have shown the malicious intentions with which the prisoner visited the school room; his refusal to listen to all explanation; the insult followed by a blow, and when that was resented by a push with the open hand (for it was nothing more), the cold-blooded, planned, and calculated murder of Butler.

Let us now, gentlemen, look at some other facts. When the fatal shot was fired; when his victim was writhing in anguish upon the floor before him; his dying thoughts wandering far away to the loved wife and little one at home, what next? Any expression of regret from the prisoner? Any indication of that remorse that would have rolled like an avalanche over his soul, if the act had been unpremeditated and sudden? None, none, none! He coolly drew another pistol, and points at the boys—prepared to shoot little Pirtle, or Benedict, if they

should approach too near, I suppose;—while Bob, drawing his bowie-knife, walks up the aisle, menacing the little boys at their seats. He denies this, but it is proven by Knight, Johnson and Benedict. If no other evidence of premeditation were to be found in this case, it seems to me that the prisoner's conduct the moment after he fired; the absence of all expression of regret or sorrow, together with the conduct of his brother and accomplice, furnish the strongest indications that the act had been coolly planned, and the plan deliberately executed.

I have now gone over the testimony in the two aspects in which I proposed to consider it. I have first taken the case as confessed by the defense; placed it upon their own testimony, and I think, shown most clearly, the guilt of the prisoner of murder, or, at the very least, of manslaughter. Then passing to the testimony for the Commonwealth, I have, by such an array of unimpeached and unimpeachable testimony, as can but seldom be brought to establish any case in court; proved most conclusively the malice; the preparation to kill, and the killing without excuse or palliation, and in pursuance of previously formed intentions. For such a deed the law has but one name, and that name is—murder.

And to meet this array of testimony—to break the links of the chain that binds this prisoner and this crime together—what facts outside of the current of events have been put in proof by the defense? The attempt to prove a custom of wearing arms in Louisville, I have already noticed. Instead of rebutting the presumptions arising from the fact of his purchasing the pistols, the limited custom, as proved, only adds to their strength.

Another fact from which the counsel, in the utter dearth of every reasonable ground of defense, try to argue a doubt as to the malice, is, that the prisoner was making preparations to go South with his family. I do not question the fact, but for my life I cannot see how it breaks the force of the presumptions as to the prisoner's intentions, deducible from his words and acts. The intention to go to Arkansas, was formed before the malice had its birth. Is it likely he would go around

and tell his friends, "I am going to kill Butler, and therefore I must give up my trip to Arkansas"? Whatever else he may be, the prisoner is not a fool. Does any one suppose that he killed Butler with the intention of going to jail, or with the expectation that bail would be refused? It never occurred to him that his trip to Arkansas would be interrupted for only killing a school-master. But as I have said before, his determination to kill was only a contingent one, and he doubtless supposed that Butler would abase himself before him, though he was prepared to slay him if he did not. These considerations, it appears to me, deprive the fact of his intended journey to Arkansas of all importance in the cause.

But we are told that there existed great disparity of strength between the prisoner and the deceased, and if one, who had not heard the evidence, should listen to the learned counsel on this point, they would certainly come to the conclusion that Butler was a modern Hercules. Strip it of all the ornaments with which gentlemen's imagination have enveloped this branch of the testimony, and what does it amount to? Butler was a young man of "fair strength," weighing one hundred and thirty pounds, or thereabouts; with a right hand so crippled that he could neither close nor open it. Accustomed to gymnastic exercises, he had acquired that sleight which indicates practice, not strength, and could do things with his arms which the witness Joyce could not do, he being, as he tells you, uncommonly weak in the arms. Does this show that great disparity of strength, that would place Ward in danger of life or limb from a conflict with Butler? The assertion is too absurd for argument. It is but a straw caught at by a drowning man.

But, the whipping; that terrible whipping! Mr. Marshall grew frantic over it; and Gov. Helm, after devoting half an hour to it in the morning, came back again to it after dinner with renewed appetite. And all this about a fact that is not in testimony; that you only hear of through a double hearsay: Matt. Ward's telling his mother what the boy Will had told him. The Court admitted the testimony for the purpose, not

of proving that there had been a whipping, but of showing the motive which Matt. said actuated him in going to the school house; and yet counsel argue before you as if it was a proved fact that the boy had been whipped. You will remember, gentlemen, that when we offered to prove all about the whipping, we were stopped by the Court. We were prepared to prove by the most abundant testimony, that the boy had violated the rules of the school and then denied the fact, and that for this double offense he was punished by a few light blows with a small leather strap. But, as I have before remarked, this testimony was excluded by the Court, upon the ground that it had nothing to do with the case; and yet a large portion of the time of the two gentlemen who have spoken for the defense, has been devoted to this fact, a fact not proved before you, and having no bearing upon the case if it was even in evidence. It proves neither justification, excuse, or palliation for the act, in law or morals, in this land or in any other land, where law reigns or order has any pretensions to existence. Possibly in the unwritten code of the Camanches some precedent for such a defense might be found, but nowhere else.

An attempt was made to get in testimony that there was an agreement, not to whip the Ward boys. We were prepared to prove the contrary had it been necessary. Gentlemen well knew the testimony to be inadmissible, but they expected the offer of it, to have its effect upon you. It has just about as much to do with the case, as the book written by the prisoner, which Mr. Marshall flourished before you, and even threatened to read to you, that you might, as he had done, travel in fancy with the prisoner from the Danube to Mount Sinai. It is greatly to be regretted, gentlemen, that amid all the pious associations called up by a visit to that consecrated spot, the prisoner had not remembered at least one of the commands there given by God to man—"Thou shalt not kill." If our young men are sent abroad to visit this spot where the ten commandments were first promulgated, only that they may come home prepared to sin through the whole decalogue in

regular order, I can only echo the wish once expressed by Jefferson, "Would that the Atlantic were a broad impassable gulf of fire."

I come now to the great sheet anchor of the defense, moored to which they hope safely to ride out the storm. Character, character, character, nothing but character: as though the history of our race was not darkened with the crimes of saints, and model men. As though the most common conclusion to an account of a desperate murder now-a-days, was not the stereotyped announcement that the perpetrator had hitherto borne a most amiable character. Byron, the greatest judge of the human heart since Shakespeare, describes a remorseless pirate as being.

"As mild a mannered man,  
As ever scuttled ship, or cut a throat."

And in a note says that Ali Pacha was the mildest mannered man he ever knew. In such a case as this, gentlemen, character is not entitled to the slightest consideration. Where the evidence is circumstantial, and the prisoner denies that he did the deed at all, there good character may come in to give preponderance in favor of the prisoner. But here, the case as proved by his own brother, as confessed by the defense, shows that his life has been one long scene of hypocrisy, got up to deceive his friends into the belief that he was kind, and gentle, and amiable. The gross insult offered by him to the deceased is fully as inconsistent with his character as proved here, as would be deliberate murder itself. Mark the argument, gentlemen, for I do not wish to labor it. The proof of character if it proves anything, would prove that he could not have acted and talked as Bob says, and as his counsel admit he did—but as in proving that, it proves too much, it proves nothing.

We have been asked in triumph by Mr. Marshall, "Did ever man prove such a character before?" Has he forgotten the story of Eugene Aram and his crime, upon which Bulwer's celebrated novel was founded? Is not the recollection of the trial and execution of Prof. Webster at Boston, yet fresh in the minds of every reading man? And Colt of New York,



who cheated the gallows by committing suicide in prison.<sup>21</sup> Did not each of these men show by testimony an unexceptionable character? And yet they were guilty. They, too, with all the dark and sinister passions necessary to make a murderer, rankling in their bosoms, had through life managed to conceal from their friends their true character. For sixty long years had Webster borne concealed in his bosom the sentiments and feelings, and instincts of a murderer, and his most intimate friends had never dreamed of it, till the occasion called them into action.

The character and the opportunities the prisoner has had, the want of all inducement to crime—born and raised in the lap of luxury and wealth—no wish ungratified—no desire unsated—no means of improvement spared; these but add, if it were possible, a deeper shade to his crime—surely better things might have been expected of him. Had it been some gaunt child of poverty and crime, born and reared amid the purlieus of Five Points, taught vice and crime from his cradle, reared in ignorance, and taught from boyhood that his life was to be one long war with his species—had such a one committed the crime, there might have been some palliation for him, and yet you would have hung him with as little hesitation as you would shoot an ownerless dog that had killed your sheep. Whatever you may do with this prisoner, you know you would have hung a poor friendless, homeless devil, such as I have described. No long array of the great and wealthy of the land would have crowded around him to shield him from the consequences of his crime. No eighteen lawyers would have been found pleading for him. And yet—and yet—his mind early warped to wrong—his fearful temptations—his Ishmaelitish fate—all these would plead trumpet-tongued for mercy. But this prisoner cannot even urge in palliation the infirmities of his temper, for his counsel have taken care to prove that he was so gentle and amiable, that it is utterly impossible he could ever have got in a passion with any one or at any one.

<sup>21</sup> 1 Am. St. Tr. 455.



I have now, gentlemen, gone over the testimony in the order proposed. I have first placed the case upon the prisoner's own testimony, and shown you that he stands before you a murderer by confession. I have next reduced to order, and placed before you the evidence on the part of the Commonwealth; placing events in the order of their occurrence, and adducing the testimony by which each event was proved, until the weight of proof is strong and clear and convincing enough, to convict the holiest angel that ministers at God's right hand, were he on trial. With such testimony before you, with the memory of your oath that is registered in heaven, and the sense that you must feel of your obligations to society, you cannot say that the prisoner is guiltless, unless you are willing to take his crime upon your own souls, and bear through life a load of infamy, that will shadow the hearthstones of your children when you are in your graves.

Will you go home to your neighbors and tell them that you have done a deed, the effect of which will be to license murder in this Commonwealth? That will make the path of safety sure and plain for the assassin; that will destroy all confidence in the laws, and drive the most peaceful to the habitual wearing of arms for their protection; that will, in course of time, convert Kentucky into one wide battle-field, and substitute the revolver and bowie-knife for the adjudication of your courts! License such deeds as this by your verdict, and those strong ties of kindred, of which my friend, Gov. Helm, discoursed so eloquently, will supply the place of law, and, like the Indian mother, the widow of the slain will train up her child to hunt down the murderer of his father. If there be no redress by law for outrages so monstrous as this; if it indeed be true that the law sanctions them, let us at least know the fact. Were sister of mine so widowed by the assassin's hand, and no law existed to punish the murderer, I would counsel her to train up her babe to the high and holy duty that the law was recreant to—the duty of avenging innocent blood. The first word she taught him to lisp should be vengeance; and when his arm had grown strong and his heart

bold, she should take him to his father's grave, tell him the story of a father's murder, place him on the trail of his father's assassin, and bid him hunt him through every avenue of life, as the blood-hound hunts his prey, until he had performed that duty in which the law had failed—the duty of punishing the murderer. Such will, such must be, the result, if juries in cases like this shall fail to do their duty, and their whole duty.

It were cowardice more base than words can characterize, in you, to shrink from discharging that duty in this case, that you know you would perform, were this some poor and friendless man on trial. I desire to create no feeling against this prisoner on account of his wealth or position in society; all that I ask is, that they shall not shield him from consequences that would most certainly follow did he occupy a humbler sphere in life. It is all folly to talk of justification, or even palliation. You know there is none; his counsel know it; his friends know it; he himself knows it; and if this crime is sanctioned by your verdict, it will be through influences that lie deeper than the surface of this cause.

I will now, gentlemen, refer briefly to some of the points made by Mr. Marshall, and if there shall be neither order or regularity in this portion of my remarks, you will please attribute it to the fact that the power of reducing chaos to order is reserved to Omnipotence alone. It was in keeping, gentlemen, with this whole case, that this prisoner should, through his counsel, insult the memory and trample on the grave of his victim. Not satisfied with the innocent blood he had shed; his vengeance not sated with the life of his victim and the anguish of his broken-hearted widow; his counsel here, in the face of God and the country, insults the memory of the dead and wrings the hearts of the living, by an expression, conveying more bitter contempt and insult, under the circumstances, than could have been embraced in any other two words of our language. Mr. Marshall speaks of the murdered man as “the puissant pedagogue.” Oh, was it not in keeping with the act he was defending? A mere schoolmaster; nothing more.

What right had he to live if Mr. Ward thought it proper to kill him? "This world was made for Cæsar."

Mr. Marshall devoted a considerable portion of his speech to impressing upon you the enormity of the offense committed by Butler in charging Will. Ward with lying. What will he say then for his client, whose first words on coming into the school room, were to denounce as a contemptible pup and liar, a little boy some twelve years old, who belonged to the school, and over whom he stood not in the relation of teacher? If it was right for Matt. Ward to shoot Butler down like a wolf for what he had done, will it not be equally right for that boy's brother to shoot Ward if you should acquit him? Suppose you turn Ward loose to-morrow, and that boy's brother should come to him when he is alone, and maimed and crippled as he now is, and say to him, "You have called by brother a liar and a pup, and you must apologize"? Mr. Ward would decline, the brother should insult and strike him, and then if Ward dared to raise a hand to defend himself, shoot him down. What jury would dare to convict him, after Ward had been acquitted? And where would all this end? I answer, in barbarism.

Mr. Marshall tells you that the boy who ate the chestnuts did not get whipped. I would like to know where he finds this in the evidence. No witness has stated it here; none dare state it, for the truth is he was whipped; and it was after he was whipped that Butler learned that little Ward was equally guilty, and that, to that guilt he added the further offense of denying it. How could he avoid punishing him then, when he had just punished the other boy? All this is outside of the record. I have not myself traveled out of the testimony, except when it became necessary to follow gentlemen on the other side in their excursions of fancy.

Mr. Marshall tells you that it cannot be that he had his hand upon his pistol or he would have shot sooner. Good God! how much expedition would he expect? More than one witness tells you, that the last words of the insult he gave, were almost mingled with the report of the pistol. One witness says "no

time" intervened; another, that "it was not more than five or six seconds between the giving of the insult and the shot;" yet Mr. Marshall is not satisfied with this. So bloodthirsty does he consider his client, that he thinks if he had had his hand upon the weapon of death he could not have refrained from using it, the moment he laid his eyes upon his victim.

But we are asked, why we have sworn Sturgus as a witness and not examined him, as though there was something strange and mysterious in it. Sturgus knew nothing of the killing, and was not summoned here to testify against this prisoner, but against his brother, who is not on trial. I hope the gentlemen's minds are easy now on the subject, and that no visions of Sturgus and his big stick will hereafter disturb their dreams or impair their digestion. In return, I hope gentlemen will permit me to remind them of a similar interrogatory propounded to them by my associate counsel, but in relation to which they have thus far maintained a dignified silence. Why was William Ward sworn and not examined? Were they afraid to trust the artlessness of childhood on that stand? There is an old adage, gentlemen, that children and fools speak the truth—and like most old adages it has its foundation in human experience. I must be permitted to say that I admire their sagacity in keeping him from the stand. You, gentlemen, will draw your own inferences.

Mr. Marshall tells you as matter of complaint, that when Barlow was undergoing the ordeal of cross-examination, a "low chuckle" ran around the court house among the audience. I noticed, gentlemen, the fact; I differ only in the name by which I would call it, and the feeling to which I would attribute it. There is a feeling, thank God, in the great human heart of the masses that revolts with horror at the exhibition of palpable, unblushing, and unmistakable perjury, and that feeling will find vent, no matter in what presence the crowd may find themselves. You may chain the limbs and seal the mouth, and yet the heart will find some means of utterance—and all who hear will understand the meaning. It was no "chuckle" of rejoicing that broke from the honest lips and

hearts of this audience, as they listened to a story that damned itself in the very telling. It was an irrepressible outbreak of honest indignation. I am sorry that gentlemen's nerves were so shocked by it; but I hope that with proper care and attention they will in due time recover from the effects of that "chuckle."

Mr. Marshall expended a vast amount of indignation upon the bare thought that it was possible for a man born in Kentucky to be bought or bribed to commit perjury. And yet, gentlemen, such things have happened again and again, and again. We do not however believe or intimate that Barlow was bought by Robt. J. Ward, Sr. If I thought so, be assured, gentlemen, I should not hesitate to say it; but believing otherwise, I will not do injustice to a gentleman whom I believe incapable of such an act. But, that Barlow offered himself for sale, no man can doubt. He denies that he said to Mr. Ward that "he was a poor man and could not afford to lose his time." But we prove that he told May and Sullivan that he did say so; and, above all, Mr. Ward himself swears that he did. That he expects compensation enough to take him to California from some one, I have no doubt. I wish California joy of her intended citizen; and I will give him one little piece of advice, and not charge him a copper for it. By all means let him change his name before he goes there. He will find the name of Barlow more inconvenient there than a blanket coat in August.

Mr. Marshall travels out of the record again to tell you, that never before has man been so visited and caressed in Hardin County, as has the prisoner in the lonely cells of his prison, and that he had made half the county his friends already. Well, gentlemen, if by making them his friends, he means that they are convinced of his innocence, I have only to say that those same friends keep very close at home, and don't come near the court house. Outside of some half dozen friends of the prisoner in town, I have yet to hear of the first man, woman, or child, who has attended this trial, who hesitates a moment in his opinion of the guilt of the prisoner. This

is all out of the record, gentlemen, I admit, and should have no weight with you; but when the other side attempt to create the impression that everybody outside of that jury box is waiting impatiently for a verdict of acquittal, I have a right to tell you what my observation has taught me as to public sentiment in the county. But, as to these visits at the jail: I, too, have heard something about them, and the manner in which they were brought about; but I did not dwell on the subject. What has it to do with this case, or the guilt or innocence of the prisoner? Less than nothing. It only proves, if true, what everybody knew before, that the people of Hardin County have warm and generous hearts; that they were willing to try and forget for a time the husband's guilt, that they might pay a passing tribute of admiration to the fond devotion of the wife, who strew, with a few fading flowers, the dark and thorny path his crime has destined her innocent feet to tread.

I have done with Mr. Marshall's argument. It reminded me of a brilliant piece of fireworks, with here a rocket darting up to heaven, and losing itself from sight in the far void; and there a revolving wheel, or Roman candle, challenging the wonder of the listening crowd, and lacking but one merit—applicability to the case. A few words for my friend, Gov. Helm, and I have done. Most of the positions assumed by him, and calling for a reply, I have already noticed at the appropriate stage of my argument, with which they had connection.

The Governor tells us in the outset of the argument that he himself was wonderfully excited against the Wards when he first heard of this transaction. I thank him for his candor. I had heard something of that "excitement"; for it was not a light hid under a bushel. What change has come over the spirit of his dream? He does not tell you that the facts as he first heard them are different from those in proof. Ah, gentlemen, there are a certain kind of spectacles that have the wonderful property of making all things look just as the wearer wishes them to look; and that which was a weazel be-

fore, becomes "very like a whale," when looked at through their golden rims.

The Governor tells you that never before in his life has he heard it asserted as law, that a jury are bound to judge of facts without being influenced by feelings of compassion. He promised to show by abundance of authorities that such was not your duty, but he has cited but one case, that of Cain, as reported by Moses, in I believe the Second of Genesis. I have not the case in court, gentlemen, but have some recollection of the facts. The punishment of Cain, was by an *ex post facto* law, and in our day would be unconstitutional. He had never been forbidden to murder—he violated no law, and there was reason why mercy should be extended to him. But there is another answer to it—he was tried by the only tribunal on the universe, in which can safely be trusted the attributes of both justice and mercy at the same time. His trier was God himself, not a jury of weak and erring mortals. The laws have vested the right to extend mercy in another tribunal. It is with justice alone that you have to deal.

But the Governor asks why it was if Ward intended to kill Butler did he not shoot him in the dark. I am afraid he has not altogether gotten rid of that first "excitement," and that he has a worse opinion of his client's heart than even we of the prosecution have. But I have already stated more than once that we do not charge a fixed purpose to kill at all events. We charge a purpose to degrade by insults and blows, and a purpose to murder if those insults or blows were resented. You will perceive at once that such a purpose could not be carried out in the dark.

But the strangest argument I have yet heard in this, and I might say with safety in any other cause, is this: That because the act is proved to have been committed in the presence of forty witnesses, you are to disbelieve the statements of all those present, because forsooth it is improbable that the prisoner would do such a deed where he would be overwhelmed with the testimony of so many witnesses. In other words, the more testimony you have of a fact the less are you to believe.



If one witness swears to it, all right, you may believe; if two attest it, you must begin to doubt; if a dozen swear to it, of course it must be false. I have no comments to make upon a position so extraordinary. The Governor makes it matter of complaint, that while we have crucified Barlow, we have made no assault upon the distinguished array of gentlemen who have come here to testify to the prisoner's character. I can assure counsel that if there had been anything in the conduct of testimony of any one of those gentlemen that in my opinion called for animadversion, it would have afforded me infinite pleasure to have done them justice. But I must beg to be excused from violating my own feelings of right and propriety merely to gratify counsel on the other side, and give them an opportunity of defending their witnesses. I have assailed the motives of the defense in bringing those witnesses here. I have told you that though the ostensible object was to prove character—the real object was to overawe you with the majesty of great names. But for this, the witnesses themselves, can in no way be held responsible. When requested by Mr. Ward as an act of friendship to him, to come here and testify in behalf of his son, it was their duty as gentlemen to do so, without inquiry into the motives of the request. I hold these gentlemen not only blameless in this, but I am free to say that a refusal on their part to come, might in a certain event, have been matter of life-long regret to them. I desire to notice one authority quoted by Gov. Helm this morning; that Tennessee case in which it is asserted that the cowardice of the murderer is a justification of the crime. I will not stop to comment upon the consequences that would result to society from the recognition by courts, of a doctrine so monstrous. It is enough to show that it has no applicability to this case. Surely gentlemen, after having proved that their client is a "man of spirit" will not now take shelter behind that Tennessee case, and allege that he was a coward, and therefore justifiable. I have characterized this act itself as a most cowardly assassination; but I do not mean by that to charge that the prisoner is a coward: the proof is otherwise, and the very fact that he



proved to be a brave man, and acted so different in this from the way in which a brave man should act, proves conclusively the most deep seated, cool and calculating malice. When a brave man forgets his nature, and his pride, and stoops to an act of cowardice, it shows some feeling at work in his heart, stronger than pride, and fiercer in its coolness than is anger in its heat.

But we are told by the Governor, that Matt. saw Campbell coming with the tongs. If so, why did he not shoot Campbell? But Campbell and the Governor don't exactly agree about this. Campbell says he had turned around to get the tongs, but had not got them when the shot was fired. It is a small matter, but it is just as well to have it right.

Perhaps, however, the richest expression that has fallen from the Governor's lips in the whole course of his long and able argument, was that in which he spoke of the "clear statement of Barlow." It was clear, gentlemen; so transparent, that not a boy in the house but could see through it. Why I would have been willing to bet any reasonable sum, that if the fellow's pockets had been searched when he left the stand, that story, written out in length, would have been found upon him. I have been practicing law some fifteen or more years, and never in all my life have I seen a case of more palpable self-convicted perjury than was exhibited in the "clear" story of that witness.

I have but a few more words, gentlemen, and then I must have so far as I am concerned. I will be with you to induce a pre-

Never before in the history of this country has the public sympathy been so easily excited, or excited improperly the public sympathy. He has waited them. The high position of the accused—the measureless enormity of the act, even the very spot selected for its commission, all add to the interest it has excited, all add to the responsibilities devolved upon you. The example of crime has been set before, and in the very presence of a crowd of boys, and youth, and the example of punishment should follow close upon its heels, that while the memory of the bloody deed haunts them through life, they will not also carry with that memory, the still sadder one of

the powerlessness of the law to protect life or avenge murder.

Gentlemen, my duty is done; yours yet lies before you. My earnest prayer is, that you may be so enabled to discharge that duty, that this prisoner will have nothing to fear but from his guilt, nothing to hope but from his innocence.

MR. WOLFE, FOR THE DEFENSE.

Gentlemen of the Jury: This cause has been so amply, and I may add, so ably discussed on the part of the accused—the ground has been so fully explored by the two gentlemen who preceded me, that but little is left for me to say. And I shall not attempt to disguise from you the embarrassment I feel, knowing as I do the distinguished character and ability of the counsel with whom I am associated. Under such circumstances, it almost seems like presumption to hope that you can be influenced by anything coming from so humble an individual as myself; but knowing as you do the great disparity between us, I trust you may receive what I shall have to say, with that allowance which is due me.

I presume for myself no power to afford you an intellectual treat—to regale you with

“A feast of reason and a flow of soul;”

but I do claim some degree of ability to discriminate whether statements are testimony or not, whether propositions are law, deeply and during the short time I shall occupy in attempting it the great business of your kind indulgence, I follow the track of the accused, and never to rest. His trial takes place in a section where I see faces indicating hearts in a fit condition for the amenities of social life; and under the sway of no blind prejudice or unmanly bias. I congratulate myself that we are in a community where no improper influence has been brought to bear against this prisoner; that no men, with hearts black and bloodless, only able to communicate the fire by which they consume and are consumed, have here succeeded, by the most foul and reckless misrepresentations, in deceiving and exasperating the pub-

lic mind, until they have excited to the last degree the feelings of a misled and infuriated populace against him.

I thank God that this court room—this temple of justice—is closed against all such influences, and that in this jury box, none of the wild cries of those who seek the young blood of this accused can reach your ears. You may think that I use strong language towards some men in the city where I reside; but if you know all the circumstances—if you are aware of the false and wilfully distorted reports they have sent forth through the newspapers—denouncing the act for which my client is now on trial, as a cold-blooded, premeditated, and unmitigated murder—a diabolical outrage, unparalleled in the annals of crime,—and exhausting the vocabulary for vile epithets to apply to him and his conduct, you must feel that it is deserved. And you cannot wonder at the prejudice they have fulminated against this young man, and the wild fires of passion and excitement they have lighted up through our whole country, until it was impossible for him to obtain there that fair and impartial trial which is guaranteed him by the benignant genius of American Law. Therefore has he come to seek it in Hardin county.

I congratulate myself that the cause of my client is so just we may rest it safely upon the law and the evidence, without calling to our aid the newspaper press, or any other improper and illegitimate influence. In the midst of those denunciations and attacks, he has uttered no word of reply, but has remained silent in his prison, with no desire to induce a prejudgment of his case, or excite improperly the public sympathies on his behalf. He has waited patiently for this investigation, uttering no murmur at the extraordinary persecution he has undergone, but with a firm conviction that at the proper time, as the laws of his country provide, he could establish his innocence to your satisfaction. Thus he comes before a jury of your country, gentlemen, and I am much mistaken in its character, if you shall refuse to dispense to him that justice which the constitution of the United States and the constitution of your own State guarantees to every man.

I shall not attempt to follow the counsel for the prosecution in a minute detail and review of their argument; for it is quite unnecessary, and would consume too much of your time. But I must say that during a criminal practice of fifteen years—a portion of which has been in an official capacity—I have never before seen such a course pursued as that adopted by the prosecution in this case. I would be distinctly understood, that I make no such allusion to the officer who represents the Commonwealth in his legitimate capacity; for I believe no more honorable gentleman exists in this or any other State. But I refer to those who, not under the responsibilities of an official oath, have made such extraordinary appeals here, and such unparalleled attempts to excite unhalloved passions against the accused. Yet these men would have you believe that in appearing here and pursuing this line of conduct, they are actuated by a sense of justice.

One of these assistant prosecutors, who has endeavored to impress it upon you that he is under the influence of no other or less worthy motive, has proclaimed here a sentiment that must thrill every man before me with horror; for it is shocking alike to every principle of religion and every feeling of humanity. He has told you that were the training of the child of Prof. Butler confided to his hands, the first word he would teach him, should be vengeance, and the second, blood. That he would instill into his infant mind no other feeling so deeply as that of revenge, and would train him up, to make it the great business of his life to follow like a bloodhound the track of the accused, and never to rest until he had found him and shed his blood!

Gentlemen, how were you impressed with such a sentiment, here in this temple of justice, in this holy place? The announcement of it must be sufficient to convince you that this prosecution is not conducted from any sense of justice, but from mere vindictiveness alone. I will venture to say that such an appeal is wholly unparalleled in the annals of criminal jurisprudence. How illy does it comport with the old maxim of law that all men are considered innocent until proved

guilty; and the ejaculation, when a prisoner is confronted with the jury, "God grant you a safe deliverance!"

A great deal has been said about the unfairness manifested on our side, but I call your attention to this, as a specimen of the spirit evinced through this whole prosecution. You are asked to convict this man whether he be guilty or not, or threatened that the son of the deceased shall pursue him, until he has imbrued his hands in his blood!

When such sentiments are promulgated, I cannot believe them the result of calm, sober reflection,—they can have been uttered only in the excitement of the moment. But do they not show, that if the bosom of him who avows them is not black with such vindictiveness, his head must be weak enough to render him the tool of those who cherish it—men who in my opinion bear no resemblance to any of God's creatures except the very Cuban bloodhound of which he has spoken, and which is provided by nature with the bloody instinct to track its victim, and to slay it.

After all that has been said about our unfairness, I maintain that never in the world was there a more unfair and distorted statement of testimony made to a jury, than that you have heard from the counsel for the prosecution. As I detail the testimony, should I make any error or misstatement, I am sure that your intelligence and your recollection will correct me at once.

I appear before you, gentlemen, as a counsel for the accused; it is my duty and my pleasure to do so. The charge against him is that of murder, committed in killing William H. G. Butler; and to this charge he pleads Not Guilty. Let us first take a survey of the case, that we may see what aspect it presents.

On the day named in this indictment, the accused sought the school room of Prof. Butler, according to his own language, "to seek an explanation of his extraordinary conduct." But what was that conduct? A little brother had been called a liar and severely whipped, in the presence of the whole school. The counsel for the Commonwealth who first ad-

dressed you has uttered a sentiment almost as shocking as the one to which I have just alluded. He tells you that the father was the only person to whom that explanation was due—that the brother had no right to demand it. From what section of the country could he have come, where he learned such a sentiment? I know not and I care not; but if there be a spot on earth where the holy ties that bind brothers, heart to heart, are not recognized, and if he really entertains such a belief, he should be exiled there. According to this doctrine, a brother must stand by and see his little brother insulted, injured and maltreated to any degree, with no right to interfere and protect him. The gentleman may tell you that is Common Law, but if it was the law in earlier times, it is certainly repugnant to every sentiment of our nature.

The little brother of the accused has been whipped. You have not seen that brother—he has not been brought before you during the progress of this trial; but he is a bright and beautiful boy—there is not one in your family whom you love more dearly, or who deserves it more, for a kind disposition or an open, noble heart. He had been publicly whipped and called a liar—a punishment to which in his estimation death were preferable—and he appealed to his elder brother to have his character vindicated.

Gentlemen, I deny the right of the teacher to whip the child. This may seem like high ground, but I believe it is right and can be sustained. It is true that the parent delegates a portion of his authority to the teacher; but it is only authority to give moral instruction. Modern sentiment totally discards this right to flog, by the teacher. He may use proper corrective influences whenever they are necessary; but he has no right to scourge the pupil as barbarians scourge their slaves. I repeat it, that so far as my own feelings go, I am opposed to whipping children. I have two little boys—as bright and beautiful, I believe, as Kentucky has produced. So far as my influence goes, I have always ordered that they should not be whipped at school. If they do wrong, I believe the parent

is the only person to discriminate as to the nature and extent of the punishment which should be administered.

Even if we go back to Greece—that glorious old Republic, whose light will continue to shine through the historic page, to the latest ages of time—we shall find that this brutal practice—this relic of barbarianism was ignored in their schools. Chastisement was then believed, as it really is, the father's prerogative. As so many incidents on this subject have been related by the gentlemen, perhaps I may be permitted to allude to one. Plutarch, in his celebrated *Lives of distinguished men*, tells us of one of his tutors named Amoneus, who, when one of the boys under his charge had done something wrong, took his own son and whipped him in their presence, to reprove them, and to show what he would have done, had the laws of his country allowed it.

Is whipping permitted in the colleges of our country? Certainly not; and you must remember this was a high school, where many of the pupils were very far advanced. Not a high school, as you have been invidiously told, because of the position in life of those who patronize it, for it is open to all who are able to pay the expense of tuition—but so called, from the nature of the branches taught there. A few years since, a student in the University of Virginia, while being punished by one of the teachers, retaliated, and met force by force; and when the matter was investigated, the faculty sustained the pupil and not the professor, on the grounds that he had no right to inflict physical punishment.

The brave seamen of our navy were once scourged for every trivial offense; but Congress has abolished the barbarous practice, as debasing and degrading to the character of a free man. In the British navy the same is true; and throughout this whole country there is a settled sentiment against this punishment. It should and it must soon cease everywhere.

But notwithstanding this sentiment, the child had been flogged; and, as we have a right to infer from the testimony of the mother, for the first time. Now, as the other gentlemen, in their argument, traveled out of the record, I presume I

may be allowed to do so. We desired to go into the cause and merits of this whipping; we called a man to produce the register of the school here, to know the ordinary deportment of this boy; but the man did not show himself, though his track has been seen more than once during this trial. I allude to Sturgus—but of this, more hereafter.

Not only has this whipping been described to you, but it has been shown to be the motive which induced the prisoner to seek the school house of Prof. Butler. His purpose was to obtain an explanation of or redress for a deep and damning insult that had been offered to his brother—that little brother who appealed to him for protection. Was this wrong? The explanation he sought, was of the cause of that teacher's conduct, in whipping and insulting the child. Does not this appeal to you as proper and right? Is there a heart in Kentucky, when one bound to it by such ties had been outraged, that would not have demanded redress?

He sought this explanation; but how was he received? He asked it in a proper, gentlemanly manner; was it granted? No; it was promptly and peremptorily refused. You have it in evidence, that Prof. Butler was intimately acquainted with Mr. Ward; that he had for a long time resided in his family, and been the preceptor of his children. This whipping was inflicted twenty-four hours before the explanation was sought—the distance from the school house to Mr. Ward's residence was not great; and I appeal to you, if under the circumstances, it was not the duty of Butler himself to go around voluntarily and make an explanation?

Just at this point, I wish to allude to the testimony of a single witness—Mrs. Harney. I do not stand here to impeach her. I have no doubt of her being a lady of the highest respectability and truthfulness. But does it not strike you as a little remarkable that in a thronged city of seventy thousand people, at a busy hour of the day, in one of its most crowded thoroughfares, as she met a gentleman whom she had seen only once or twice before, she should have scrutinized him so closely as to observe that his hands were in his pocket, and that he wore



a firmer look than usual? Ah, gentlemen, there is a key to this! Butler was an inmate of her family; he knew that what he had done was wrong—that he had a right to expect it would excite the feelings of the family, and he had undoubtedly apprised her of the fact. If this were not the case, could there be any reason on earth for her observing so closely the conduct of a gentleman who was almost a perfect stranger to her?

Such is a general view of the case; now let us look more minutely at the ground on which we stand. I argue that we are able to vindicate ourselves on the ground of self-defense. You, gentlemen, all recognize the great principle—coeval with our existence—not derived from the laws of society, but inherent, and far above them all—the principle of self-defense. Were we deprived of this, there would be no other right worth having; the most responsible and important duties of life could not be performed. And when a man is brought into a position of danger, where his life is imperilled, or he has reason to apprehend great bodily harm, he is bound by his duty to God and society, to exercise the right which Nature has bestowed upon him, and defend himself, even to taking the life of his adversary.

It is true that government professes to extend protection to the citizen, and that the citizen on his part is expected to support and submit to the government. It is true that there are legal tribunals to be appealed to when a wrong is done; but these tribunals and these laws do not propose to furnish you with protection, when your life and limbs are in immediate and imminent danger. There would then be no time to appeal to them, and therefore society guarantees to every man, on such occasions, the right to protect himself. But I need not have reminded you of these truths; they are so well established, that every man in the country is aware of them.

Before we go further, however, let me call your attention to one or two points, alluded to by the counsel on the other side. They contend that where a man procures a deadly weapon, and afterwards becoming involved in a struggle makes use of it by killing his adversary, it is a correct inference that

he procured it for that very purpose. I deny the assumption *in toto*; and during this discussion I desire you to keep entirely separate the two facts they would thus connect. A man has a right to carry arms; I am aware of nothing in the laws of God or man prohibiting it. The Constitution of Kentucky and our Bill of Rights guarantee it. The Legislature once passed an act forbidding it, but it was decided unconstitutional, and overruled by our highest tribunal, the Court of Appeals. I contend, that if I see proper, I have a legal right to arm myself from the crown of my head to the sole of my feet.

When this right is guaranteed to a man, and he procures weapons legally, it is absurd to infer that he obtains them with intention to do an unlawful act. As an illustration: Suppose you are about to go on a journey to Louisville, with a large sum of money in your possession. Knowing the character of the road, that it is infested with robbers, you take the precaution to arm yourself before you start. On the way you meet a robber, who attacks you and would deprive you of your property; you resist and slay him. You have a perfect right to do so and protect yourself; and will the fact that you obtained weapons before you met him indicate any improper or unlawful intention on your part?

Again: Suppose from threats that have been made, or some other cause, you believe you have reason to apprehend an attack from some enemy. You procure arms that you may defend yourself against him; but before you meet, or he makes any attempt to harm you, you become involved in contact with some other man with whom no previous trouble had ever occurred. If he attack you, and you slay him during the affray, even if your conduct is blamable, you cannot be indicted for murder, because you procured arms not with malicious intent, but for the legitimate purpose of defending yourself.

Even if you procure weapons for an unlawful purpose, to fight a duel for instance, and on the way to the field, being attacked, you defend yourself by slaying your adversary, the

act is a justifiable one. Your conduct in procuring arms for the purpose you did, was unlawful; but does that make it unlawful for you to use them in your own defense?

My object is to show that when a man arms himself for a general purpose, there is no rule of law by which it can be converted into a special one; that if he does obtain weapons and uses them lawfully afterwards, the procuring of them was no crime. If Mr. Ward procured pistols before the conflict, and during the conflict unfortunately slew Mr. Butler—I say unfortunately, not that I deem the act a guilty one, but because the loss of human life under any circumstances must cause a pang of regret to the hearts that are left behind—if during the catastrophe, he acted only according to law, the fact of his procuring the pistols cannot make an act unlawful which was otherwise justifiable and proper.

Before I proceed in the discussion of this case, I desire to lay down a few principles of law for your government in considering it. In regard to the amount of evidence necessary to convince a jury of the guilt of a prisoner, it is a well established principle that the evidence must exclude every other conceivable hypothesis except the one of his guilt. If room is left for the existence of any other belief, the evidence is insufficient. In this case, before you can convict, the hypothesis that the accused killed the deceased in self-defense must of course be totally excluded.

The proof must be sufficient to satisfy the minds and consciences of the jury beyond a reasonable doubt of the guilt of the prisoner. To be convinced beyond a reasonable doubt the assurance must be so great that you would not hesitate to act upon it in matters of the highest concern to your own interest. Such is the law in regard to the amount of proof required.

Now, gentlemen, you have it in proof that Ward went to the school room of Butler to obtain an explanation; that Butler steadily and persistently refused the explanation which was due; that in default of receiving it Ward denounced Butler as you have heard, whereupon Butler seized him and as-

saulted him in such a manner that, as we contend, he had reason to apprehend great bodily harm; and that, therefore, he is not responsible for the death of Butler.

One of the gentlemen for the prosecution admits he does not believe that the accused sought the school room determined to kill Butler at all hazards, and thus refutes their own presumption of malice. Again, he tells you that Ward had reason to expect a blow, after using the language he did—that no man in Kentucky would receive such language without giving a blow; and yet he reads law to you to show that no language whatever will justify an assault. It seems to me that he sets at defiance even his own landmarks.

It has been told you, in triumphant tones, that a man's house is his castle; that Butler was in his house, and therefore Ward had no right to go there. The general principle is a correct one; the law makes my house my castle, and not even my best friend has a right to cross its threshold without my permission. But this rule only extends to the sanctity of the private dwelling; and by no correct reasoning can it be carried further. It is true that I have no right to enter your house without your consent, but there is a tavern across the street: I have just as much right to enter that as the owner has, and he has no right to expel me.

But even if a man enters your private dwelling unbidden, you have no right to expel him, except in the manner prescribed by law. If you attempt to put him out by force, without having first used gentle means, and are killed during the conflict, the act will not be murder. I may seek your house for money you owe me, I may go to buy produce, or on any other legitimate errand; and have you a right, because you see fit to take umbrage at something I say or do, to seize me by the nape of the neck and kick me, like a dog, from your threshold? By no means; you have no right to resort to violence until I resist.

I maintain that in this case Ward had a perfect right to seek the school house for the transaction of any legitimate business; that the errand on which he went was proper, and

that when Butler attacked him he violated the principles of law and made it right and justifiable for Ward to resist. I maintain that the accused did not cause the difficulty; that his character, habits and the circumstances of the case all preclude the possibility of it.

I maintain that there was no deliberate purpose on his part to kill or to do any great bodily harm. The law states that such intention is to be inferred where the prisoner makes declarations of intent to kill, deliberately and advisedly denounces vengeance, declares that he will have the blood of his adversary, or makes direct preparation for the conflict. Is there any proof of such a state of facts here? I have shown, remember, that unless the accused acted unlawfully during the conflict, the fact of him procuring weapons previous to it can be in no way connected with and have no bearing upon the case.

The law says that the man attacked must be driven to the wall before he is justified in taking the life of his adversary. It is in proof that the prisoner was driven to the wall. They have read law to show that no words whatever can justify a blow; and even according to this, their own law, though I believe it is contrary to the law of God, Butler was the first aggressor. By this law Ward might have stood and cursed him all the day, and he would have no right to resent it.

JUDGE KINCHELOE called attention to the subject to which he had referred in the morning—the publication of testimony contrary to the order of Court. He observed that the character of that order had been misrepresented; in making it he explicitly made the distinction, and applied it only to those reporters who accepted the courtesies of the Court, by taking seats provided for them inside the bar. Upon other reporters he had attempted to lay no injunction whatever. The reporter for the *Courier*, who was present (Mr. George W. Cole), he had every reason to believe was a highly honorable gentleman. He had at first accepted a seat under the order of the Court; but since this testimony had been published, the Judge had received a note from him, resigning his seat and stating that

when he took it he did so in good faith, assenting to the order; and that when he delivered his reports to an agent of the paper, who was now present, he had given them under the express condition that the order of the Court should be respected, and that they should not be published until the case was concluded. That agent for the paper had also stated to the Court that he forwarded the reports to the office, with precisely similar instructions. As an act of justice to the proprietors, perhaps it was right for him to state, however, that the copies which had reached town were only stray ones, the regular bundle having been withheld, as it was presumed that the publication should exert no influence in the community where the trial was progressing. A similar case might never again occur in the State of Kentucky, and the Court thought it best to take no further steps in regard to the matter.

*Mr. Wolfe* (resuming his argument). Gentlemen of the Jury: I endeavored in the argument which I submitted to you before the adjournment of court, to inform your minds in regard to a few of the principles of law applicable to the case, while considering the question of murder. I desired you to understand them as fully as possible, because it is on the law and the facts that we wish to try this case. And, while I utterly repudiate and deprecate the idea that you should disown one of the noblest sentiments of our nature, that you should lay aside all compassion, and all mercy, forget that you are fathers, and forget that you are men, I stand here with the proud consciousness that my client has nothing to fear at your hands, if you consider his cause upon the law and the evidence.

According to the definitions of the books, murder contains three elements; there must be a killing; a reasonable being must be killed, and the act must be done in malice, either express or implied. You have heard murder fully explained; that malice is an essential ingredient, and that if a man kill another with no provocation, or a very slight one, it is murder. But why? Simply because in such cases malice is implied by law.

All these principles of law that relate to the crime of murder are to be taken separately, and you must remember that self-defense, whenever it is proven, outweighs the crime. You have been told by some of the authorities that if a man be in fault, and his fault cause the difficulty between him and his fellow man, in which the latter is killed, it is murder; but this is to be taken with great caution. You have also heard it read from high authorities that when A. meets B. with no malice in his heart; an affray ensues, and A. being driven back to the wall, kills B., he is justified in the eye of the law if he does it in self-defense. On this point the law is perfectly clear.

But they contend that if you have been in fault at all, when you are attacked you must not avail yourself of the right of self-defense, which is guaranteed to every man alike by the laws of nature and of human society. Does this seem reasonable? Suppose a man assails you in your absence, or defames the character of your wife or daughter. You seek him, or inadvertently meet him, and denounce him as a scoundrel and a villain. If he attack you then, have you no right to defend yourself, and resent the insult? In this law, in Kentucky, and in this Union? I deny it.

It has been said here, that in case of assault, where your life is not in danger, you must seek redress only in courts of justice. If a man meets you in the public street and lays the cowhide over your back till he has no strength left, your life may not be in danger. But you must therefore wait and seek justice by bringing suit against him for assault and battery? Is such the law here? Why, they gainsay the very proposition of law they lay down in this case, by admitting that when the lie is given, he who gives it must expect a blow!

As I said before, we plant ourselves here on the great principle of self-defense—that principle without which we cannot discharge the duties we owe to ourselves, to society, and to God. The law defines self-defense as that principle by which a man may protect himself against an assault. An assault, remember, does not necessarily include a battery; there are cir-

circumstances under which the raising of the hand is an assault. The law justifies a man, in the case of a sudden brawl, in killing the man who assaults him, after he has retreated to the wall or some other impediment, and is in danger of losing his life, or receiving some great bodily harm. This is the grand principle, and any contrary law could never be enforced or administered; it would be execrated and spit upon, as contrary to every principle of our nature, and to the laws of God himself.

Through tenderness to human life, the law only allows the man who is assaulted, to slay his adversary, after he has retreated to the wall or some other impediment. The prisoner at the bar strictly complied with this injunction and only took life when reduced to the last alternative. "And this," says the author from which I have just been reading, "is a doctrine of universal justice, as well as of municipal law."

I am sure that I may here leave this point, for I believe every man in this jury box understands the principle I have laid down, that where, in case of extremity, there is danger that a man's life may be taken, or his person mutilated or enormously injured, he is justified in using whatever adventitious aids he can procure, in protecting himself, and if necessary, in taking the life of his adversary.

An important point in this case is the comparative strength of the parties. Where one was so unusually weak and feeble it became more necessary for him to make use of these adventitious aids, than it would otherwise have been.

If we turn from English to American authorities, we may see how the law is administered here on this subject. In the case of *Selfridge*,<sup>22</sup> in Massachusetts, many years ago, charged with murder, the principle was decided, and has since been universally recognized as law, that it is not necessary for a man really to be in danger of death or great bodily harm; but that if he has reasonable grounds to apprehend such danger, he is justified in killing his adversary, whether it existed or not.

<sup>22</sup> 2 Am. St. Tr. 544.



To illustrate: Suppose a man is very hostile to you; and has made threats to do you bodily harm, and you know it. You see him point a gun at you, as if about to shoot. Now, it may be that the gun is empty, and that he only makes the movement to excite your fears; but you are justified in slaying him the moment you see it. This is in accordance with common sense, as well as with law; you have good reason to apprehend danger. How absurd the other principle, which would compel you to go up to that gun, examine it, and ascertain how many fingers of charge it contained, before you could take any measures to protect yourself.

In the case of Granger in Tennessee, this principle was also established, and it is one that must appeal to reason and humanity. The cruelty with which the law was administered in former times, shows that the world was in a degraded condition, and that human rights were not properly appreciated. There was a time when there were no less than 140 offenses punishable with death. In those days, if a man broke down a mound in a graveyard, or disturbed a fish-pond, it must cost him his life. But now, those rigid rules have been ameliorated by a more genial and civilized code, which goes a bowshot further than these musty old English books, and places a higher value on human life; it is the American doctrine of self-defense.

The gentlemen have alluded to cases not recorded in the books, and as they have furnished the precedent, I will relate a few. Near Boston, in this State, Stout was tried for the murder of Bullock. During a political campaign, the former, who was a Democrat, set up a flag, which Bullock pulled down. Stout would have shot him at the time, but his friends held his arm. Bullock went to a grocery where he spent the day; and when he was returning home at night, he stopped at the house of Stout and called for whiskey. Stout refused to give him any, and ordered him to leave the house; he would not obey, and Stout took his gun and shot him. He believed from the previous conduct of Bullock that he had come there to do him bodily harm; he was weak and small, Bullock was a large,

strong man, and, therefore, the homicide was held to be justifiable.

In the Jefferson circuit, a few years ago, Coon was tried for the murder of Shaeffer. The latter had insulted Coon's wife, and Coon went to obtain redress. He told Shaffer of the insult, whereupon he raised his arm, as Coon thought to strike him, though it afterwards appeared that his hand only contained a small piece of wood. Coon then plunged a file into him, and it immediately proved fatal, yet the jury sustained his conduct.

The case of Owen, charged with the murder of Haire, caused so much excitement in Louisville, a few years ago, that it was necessary to obtain a change of venue to secure a fair trial. The parties slept in the same bed; in the morning Haire missed some money, and accused Owen of taking it. Owen asked an explanation; it was refused, and he prepared himself with a pistol before they met again. Haire, I believe, also had a pistol, but Owen shot him, and was acquitted on the ground that he had a right to obtain redress for the injury done his character.

Five or six years ago Louisville was boiling over with excitement and some prisoners were in danger of losing their lives while going from the Court House to the jail. They sought a change of venue, obtained it, and were tried and acquitted. I allude to the Wilkinsons from Mississippi. One of them was on his way to be married to a young lady in Bardstown; and while they were in Louisville they went to the shop of a tailor, on business, and became involved in some trouble with him. The tailor and his friends afterwards came around to the Galt House, where they were stopping, and assaulted them. In the melee three of the assaulting party were killed, yet the prisoners were acquitted, for it was believed by them that they were in danger of great bodily harm.<sup>23</sup>

These, gentlemen, are Kentucky cases; and, as well as the ones in Massachusetts and Tennessee to which I have alluded,

<sup>23</sup> See 1 Am. St. Tr. 132.

appeal to reason, and support the principle that it is not necessary for a man's life to be in extreme danger; that if he has good cause to believe it in peril, or to apprehend great bodily harm, he is justified in taking the life of his opponent.

I have now, as I apprehend, in a tedious manner, endeavored to show the law as applied to this case; I have cited the authorities to point out the difference between murder, manslaughter and justifiable homicide, and I plant myself on the fact that we are sustained here by the principle of self-defense—that great principle which is recognized and respected by every citizen of Kentucky, and every citizen of the United States.

I will now refer to the testimony which has been adduced; but first permit me to allude to the gentlemen who have spoken on behalf of the prosecution. I do it with no disrespect; but if we would seek a parallel for their course I know of no place where we would be likely to find it, unless we go back to the celebrated case of the Kilkenny cats. If they do not bear a remarkable resemblance to those famous animals, in view of the fact that they have completely eaten each other up, I am very much mistaken.

The gentleman who spoke yesterday, Mr. Harris, joins in the anathemas that have been hurled at the devoted head of our witness Barlow; and, following the example of the great Ajax Telamon of this prosecution, who denounced him as a liar at an early stage of his testimony, assures you that he does not believe a word he uttered; that Barlow never saw Butler, but obtained all his information in regard to the case from the schoolboys. Now the Herculean effort of Mr. Carpenter's speech was to prove that Barlow did not visit the school house at all; that he never saw the boys, and that those boys never gave any one the account of the transaction which Barlow has detailed here. We perfectly agree with the gentleman on one point—that this witness did not obtain his knowledge of the affair from the school boys, though we contend that they gave a history of it, in general terms, similar to that which he received, to two of our other witnesses, Allen

and Gudgel. I only allude to the fact to show one of the many discrepancies between the counsel for the prosecution themselves.

The gentleman has given you a Scriptural illustration, comparing himself to David, who, as he tells you, went out to fight against the Philistines, armed only with a shepherd's sling and seven smooth stones. Now we, I presume, according to his comparison, are the Philistines; but the gentleman seems to be rather unfortunate in his Biblical recollections. He must remember it was against Goliath that young David went; and that it was Samson who fought with the Philistines, slaying three thousand of them in one day, and that, too, with the jawbone of an ass. And I can only express a devout hope that I am not to meet with a similar melancholy fate, and be ruthlessly slaughtered here, by the same dangerous weapon!

In speaking of the testimony of the school boys I would not be misunderstood. I allude to them in no disrespect, for I know them well; their character is above suspicion, and they are sons of the first and the best families in our city. I honestly believe that there is not a single one of them capable of a wilful misstatement of facts; but, gentlemen, there is a power behind the throne, which is greater than the throne. There is a man by the name of Sturgus, who, though a superintendent in the school, though he was present, on the ground at the time, is not here. His testimony, it would seem, must have had some pertinence and some importance; but though he was subpoenaed to be present, he has not dared to darken these doors. I contend that he has infused ideas into the minds of these boys, during his intercourse with them, that have given an impression calculated to confuse and mislead their recollection. I contend such misrepresentations have been so often made to them, as to render it impossible, however good their intentions and unimpeachable their integrity, for them to appear before you and give a correct, faithful history of the occurrence. And this man Sturgus—he who gives so exalted an idea of his courage by stating that when

he saw his friend killed he made his way out of the nearest window—who, when he reached Dr. Caspari's office, instead of asking them to send for a physician, might far more appropriately have said:

“I am the rider of the wind,  
The stirrer of the storm,  
The hurricane I left behind,  
Is yet with lightning warm;”

for if he had not kept in advance of the lightning on his flight it was only because nature neglected to provide him with the ability to do so—this man, I must believe, has instilled into the minds of the school boys ideas not consonant to their calm judgment, and their unaided recollection.

Knight, Campbell, Benedict and Quigley were the only pupils who were facing the parties, and saw the transaction. The fact is an important one, for they corroborate to a great extent our witness, Robert Ward, who has been so violently and unreasonably assailed. Now the testimony of Knight as to the conduct of Butler, is contradicted by all three of the others. Campbell tells you that when he heard the lie given, he knew from the character of Butler there would be a difficulty, and, intending that Butler might have the advantage of Matt. Ward and whip him, he turned around to pick up the tongs and keep off Robert. Contemporaneously with this movement, and while his back was to the parties, the shot was fired. But what did Quigley see? I maintain that he saw a great deal. He testifies that he saw this prisoner pressed up against the wall by the deceased; and Benedict corroborates him, adding that he was bent down towards the earth by Butler's grasp, or giving that idea, if not expressing it in the same words. These, you should remember, are the statements of two witnesses for the Commonwealth, who stood with their faces towards the parties and saw the whole transaction. Campbell, it is true, has involved himself in the statement that Butler moved towards Ward; but he confesses that his back was turned, and that he only judged this was the case from a noise on the floor. Therefore Knight is the only wit-

ness who can be said to contradict Benedict and Quigley, in these important statements, at all. I ask you, gentlemen, as I stand here in this temple of justice, with a full view of my responsibilities as a man and a lawyer, if I have not stated their testimony fairly?

Worthington, it would seem, from the history he gives of it, heard every word of the conversation, except when the lie was given; yet does not this look a little singular, when he was at least twenty or thirty feet from the parties, and Pope, Campbell, Pirtle and Knight, who were much nearer, the latter being within four feet, only heard broken portions of it? I certainly do not charge him with wilful misstatements, but, gentlemen, you know what boys are; you know that in such a school there is always a leader, some juvenile Ajax, whose words, when he speaks, are echoed by all, and whose statements are adopted, impressed upon the mind, and believed to be true. On this principle I account for the inconsistencies of the school boys.

But we have enough from them to show the general facts, that Matt. Ward and his brothers visited the school house, Willie being the last to enter; that Matt. called for Butler, who came out; that Matt. approached him, bade him good morning, and he bowed; and that when Matt. desired a "little conversation" or "an explanation," he invited him into his private room. The latter fact, you will remember, was first positively stated by Knight, though, on the cross-examination, he admitted to the Court and jury he did not hear a single word of it, but that he had since received the impression. He spoke as confidently as any of the witnesses; yet he did not intend to tell a lie—he did not wish to perjure himself, and the statement only shows the fact I am contending for, that there is a power behind the throne greater than the throne. It is said that even men may repeat anything, however absurd, until they really believe it; and so with these boys. What they have stated, they honestly believe.

One point, in the testimony of young Pirtle, is so remarkable that I would call your attention to it. He tells you that

he caught the words, "ideas of justice," early in the conversation. Now what does Robert Ward say? That the first question asked by the prisoner was, "Mr. Butler, what are your ideas of justice?" And so this young man whom they have attempted to impeach here, is corroborated from first to last. You must know, from the fact that have come before you, that he is detained in jail unjustly, and when the gentleman said that he stood, even now, with the halter around his neck, he made a proposition alike insulting to reason and to law. A man who does not know the law better than to believe this, should study it long by the midnight lamp, before he appears to practice in a court of justice. I deny the statement that if Matt. Ward is acquitted, Robert must escape, *ipso facto*; it is not law.

In a few particulars Robert Ward is contradicted. For instance, he tells you that the prisoner held his hat in his left hand and gesticulated with the right, while some of the boys state, that from the first, his right hand was in his pocket or muffled in his coat. Now these boys were engaged in their studies; when the parties met, they apprehended no difficulty, and I ask you if it is not a remarkable fact that they should notice the position of a gentleman's hands, when he entered the school house and appeared as gentlemen ordinarily do? Can you recollect whether your own hands were in your pocket or not, when you came to that jury box an hour ago? Can you remember how mine were disposed, when I rose to address you? And yet they testify thus minutely in regard to so trivial a fact which transpired months ago, under no circumstances likely to cause extraordinary scrutiny. And this is only a part and parcel of the scheme of that power behind the throne, and its confederates, who are determined to be glutted in the blood of this interesting and innocent young man.

They ask why William Ward was not introduced, and tell you that he saw the whole transaction. Now their recollection is very strange—they remember a great deal of testimony that I think never was given, and they seem to have forgotten

a great deal that certainly was given. You must recollect it as appearing in proof that during the conversation between the parties Willie was so earnestly engaged with young Johnston, that they did not hear a word of it. It is easy to perceive therefore that Willie could give no testimony in regard to it; yet because he is not introduced here we are charged with suppressing testimony, and you are told that you must believe Robert Ward a perjured witness.

I return to them, and ask why Sturgus was not introduced. If I were allowed to do so, I would explain that he appeared as a witness in the examining court, and there made such statements that he is ashamed to appear and give testimony in the case again. And Dr. Caldwell—after they had subpoenaed him and brought him here, why did they neglect to call him to the stand, and compel us to introduce him? A witness so important and so intelligent could not have been left out by accident—the secret lies in the fact that he fully corroborates Barlow. Yet the gentlemen talk to us about suppressing testimony, when this is the manner in which their whole case has been conducted, from first to last. As I said before, I do not bring aught against the honorable representative of the State; but I allude to these emissaries of blood—these men who profess to act from patriotic motives, when they are in reality only ministers of the vengeance of others, and the shekels of silver may be heard to rattle in their pockets.

It is true that Robert Ward has been in jail for six months, but it is equally true, that in order to be an aider and abettor of the crime charged in this indictment, he must have known the object and intention of the prisoner to be murder, even if such were his intention, which the testimony utterly precludes and which I utterly deny. Suppose I meet you in the street and without telling you my purpose take you with me to an enemy and kill him before your eyes. Can you be justly charged with aiding, abetting and countenancing the act? Assuredly not; yet in this case, and on such grounds, when his brother's life is in danger, they would have excluded Rob-



ert Ward from testifying because his name is in the indictment. But, thanks be to God, it was before a judge who not only possessed too little hardness of heart, but too good an understanding of the law, to make such a ruling.

It has been related to you, that when the parents returned from Cincinnati, the mother was told by the prisoner that her little boy, the darling of her heart, had been whipped and called a liar, in the presence of the school. I know not what others may think; but I have six children, and I will never allow one of them even to call another a liar. Can you wonder at the feelings of a parent's heart, when told that his child—the noble boy, his pride and his love—over whom he watched fearfully in sickness through the long vigils of the silent night, and in whom he hopes to live again, when he sleeps beneath the sods of the valley—has been publicly injured and disgraced? I endeavor to teach my children to love one another, and when they err, I take them apart and kindly tell them of their fault—do not attempt to disgrace and degrade them in the presence of the family. Thus I hope they learn to regard their father as a friend in whom they may confide—an adviser on whom they can rely, and his house a refuge and a home, in all their childish sorrows.

You have heard the circumstance under which it was done, and I ask you if there was anything wrong in the act of this prisoner, when he went to seek an explanation? Even admitting that he armed himself with the pistols, he knew that Sturgus, who was his enemy, was much larger and stronger than himself, and as Willie expressed it, had “a big stick around there,” and had he not the same right to take precautions for self-protection that any other man has?

Look at the manner in which it was decided that Robert should accompany the prisoner. He knew that he was weak—utterly unable to sustain himself in conflict—yet he apprehended no difficulty, and it was not until his mother had repeatedly urged it upon him that, to gratify her, he impatiently told Robert to get his hat and come. On the way, he assured him that he expected no difficulty whatever—that he

had always found Butler to be a just man and believed he would do what was right; therefore, he cautioned Robert not to interfere by word or deed. But Willie spoke up and reminded him of the stick, and then he repeated the injunction not to interfere, with the proviso, unless both Sturgus and Butler should attack him at once. And what does the conversation on the way indicate? Robert tells you that they met Lucy Stone in bloomer costume—one of these singular women who would exchange places with men and assume the breeches, as the first step thereto—and that their conversation turned to the singularity of her dress. Does this denote a heart bent on mischief and filled with malignity towards a fellowman? On the contrary, does it not comport perfectly with the previous declarations of the prisoner, that he apprehended no difficulty whatever?

When Ward saluted him, Robert tells you that Butler bowed rather stiffly; and in answer to the questions that were put to him, he replied haughtily, "I will not be interrogated, sir." And when he utterly refused an explanation, Matt. told him that for calling his brother a liar he must have an apology. The gentlemen have spoken as if the whole case hung on this point, and have denounced it as the language of the master to the slave; but you know the term "must" is used very frequently in cases where a wish merely is expressed—no imperious demand made; and Robert assures you that in this instance no particular stress was laid upon it.

Then, when all explanation and apology were at last denied, he availed himself of the only satisfaction left, and denounced Butler as a scoundrel and a coward. Even according to their own version of it, that the language he used was, a liar and a scoundrel, how is the case altered? His little brother had been called a liar, and his heart was still bleeding from the injury and disgrace. There was no other way to vindicate him; every peaceful expedient had been tried, and there was no other alternative. But the moment this is done, Butler springs at him, seizes him, forces him back to the wall, and strikes him twice more in the face; and then he fires the shot.

In the language of the decisions I have alluded to, had he not good reason to apprehend that "great bodily harm" would be inflicted?

We have proved satisfactorily, by witnesses of the most honorable character, that even after the pistols were purchased, the prisoner was making preparations to leave, on the following Monday, for his plantation in Arkansas. We have offered this proof to show that his mind was engrossed; and contending that it could not have been so, had he then been under the influence of a heart bent on mischief, and contemplating such a diabolical act as the one that is laid to his charge.

Butler was shot; was taken to Col. Harney's residence, and there laid on the floor, in front of the fireplace. Dr. Thomson was sent for, and came to attend him. And here I must call your attention to a single fact. The counsel on the other side have contended that Matt. Ward must be considered guilty, because he purchased the pistols before he visited the school house. But when Dr. Thomson was brought to the stand, I asked the question whether he now had pistols on his person, and I think, with all due respect to the Court, though I submitted readily to its ruling, that the question was legitimate, and should have been pressed. There is no law against wearing arms, nor can the admission that he does so, disgrace a witness. But the Court decided that he need not answer it; and then I thought the witness grew up nearly as large as Satan is represented by Milton, when the angels opposed his entrance into the gates of Paradise. I contend that this sustains my position that arms may be worn, with no violation of law, or intent to do an unlawful act. Dr. Thomson is a member of the church, and a teacher in the Sabbath school; yet I infer, from his refusal to answer, that he carries weapons.

*Mr. Allen.* If the Court please, I wish to inquire whether that is a legal inference?

The COURT: It is not.

*Mr. Wolfe.* True, but it is a rational inference. I consider

the act neither unlawful nor disgraceful; in the British courts it would be a penal offense, but in this country the law is different. And this witness, who, as I contend, we have a right to presume, wore arms himself here, takes the stand, as if he would say:

“Dispel these clouds, the light of Heaven restore;  
Teach me to see, and Ajax asks no more.”

Well, Dr. Thomson comes here, and he makes a very strong statement. I believe him to be a gentleman of honor, but I also believe that his feelings are so deeply interested in this case that they may have warped his judgment and his recollection. He tells you that Butler, in giving an account of the occurrence, said Ward came to the school house, and cursed him and struck him; that he struck back, and was shot. We contend that this was not the nature of the statement made by Butler. It is contradicted by several witnesses, and among others, Barlow, on whose devoted head so much excited feeling and virtuous indignation have been vented by the counsel for the prosecution. Now, I maintain that Barlow is a good man—as good as Dr. Thomson, or anybody else. It may be that among the ruffle-shirted young men who promenade the streets of Louisville, with canes in their hands and an M. D. attached to their names, a poor carpenter, who shoves the plane at \$1.25 per day, is not considered so respectable as they; but you, I am sure, wholly repudiate all such sentiments. Who is this Barlow? He is an honest mechanic, who works steadily at his business, and who has proved as good a character here as any man could desire. And we have shown that he stated precisely the same facts he has detailed to you to various persons, within an hour after the event occurred. Where could he have learned them then, if his statement be not correct?

Another witness for the prosecution, Dr. Yandell, who was with the deceased, in company with Dr. Thomson, and on the other side of him when he made the statement, tells you that Butler said, while they were engaged—engaged, as I contend, in that very scuffle, of which Barlow, and Quigley, and Ben-

edict, and Robert Ward, have all spoken—he struck Ward, and Ward shot him. And on being asked, “Did he say that Ward struck him at all?” the witness replied, “I did not hear him.” He thought from the manner in which Butler raised his hand, he meant to indicate that Ward made a threatening gesture; but did not hear him say he struck at all. Dr. Caldwell also states emphatically that Butler told him when he was given the lie, he struck the prisoner for it. Now, here are two gentlemen of the most undoubted respectability and most honorable positions in life—gentlemen whose integrity is above all question—and yet they corroborate Barlow, and contradict Dr. Thomson. Are you prepared to discredit them?

But Barlow testifies that Dr. Thomson carried his case of instruments in his hand from the school house to Col. Harney’s; and the Doctor tells you that he did not, that he never does it. And Mr. Carpenter assures you that Dr. Thomson is no quack—no charlatan, who must advertise himself by exhibiting the instruments of his profession as he walks the public streets. Are you to suppose that in such a case a physician would stop to consider so trivial a matter? Are you to suppose that when a dying man is in need of his services, Dr. Thomson must pause and carefully adjust his case of instruments in his pocket, and button his coat over them, that they may not be seen, before he goes into the street, lest he should be considered a quack and a charlatan? Then how is Barlow discredited? I appeal to you if he is not fully corroborated, and if he did not prove here, by reliable witnesses, a better character—I speak only of his reputation for truth and veracity, not of general character—than even Dr. Thomson himself? If my recollection is perfect, five or six witnesses testified to this for him, while only one or two gave the same testimony in regard to Dr. Thomson. And has not all this insult and traduction of Barlow been utterly unjust and without cause?

Then, gentlemen, how stands the case? This accused—this wan and feeble man—this invalid who, though five feet ten inches in height, weighs only 110 pounds—with the sanc-

tion of his family, went around to the school room of Professor Butler to ask an explanation, which was justly his due. The man he visited was far his superior in strength, and though they have argued that one of his hands was disabled, we have shown that he possessed extraordinary muscular power, and that there was no reason to prevent him from striking a heavy blow. A dispute occurred—the explanation was refused—all apology and satisfaction were denied, and he then took the only redress in his power, by denouncing Butler as his little brother had been denounced before. Then he was attacked, pressed back against the wall, struck and bent down, as you have heard, and he fired the fatal shot.

They tell you he must have visited the school house to do a diabolical deed—with a heart bent on mischief and vengeance. His disposition utterly precludes the idea. We have brought here men that you respect and esteem—men you have honored by your confidence and support, and they all prove it wholly at variance with his character. Men have flocked here from all parts of the Union—the farmer has left his plough—the mechanic his workshop—the lawyer has left his office—the doctor and the editor theirs—the soldier has come from his post, and the statesman from the halls of legislation—all to tell you that this young man is incapable of such a deed as they ascribe to him.

One taunt that has been made here fills me with horror. The gentleman speaks of the visit of this accused to the holy mountain where the will of God was first revealed to man, and advises him to go back and see if in the decalogue he there read, there be a command to do no murder. Now, gentlemen, I will read to you from this volume, what he wrote from that sacred mountain, to the mother from whom his earliest impressions were received, and you shall judge whether it is the emanation of a heart capable of such a fiendish and wicked act as the one that is laid to his charge. He says:

“I stand upon the summit of Mount Sinai. What endless food for memory and association in the thought! To trace the course

of Moses up to the sacred mountain—to visit the scene where our Lord deigned to hold converse with his servant—to feel yourself on Mount Sinai, upon which rests all that is earliest learned in childhood, and most dearly prized by man, is worth a lifetime's weary pilgrimage. I forgot fatigue, anxiety, and all the weariness of the desert. I could only remember that I was upon Mount Sinai. Go there, if you would feel as you never felt before. Go read, as I have done, the decalogue upon the very spot where Moses received it from the hands of the Almighty. Enter the cleft in the rock into which Moses fled as the glory of the Lord passed by. Remember that fearfully sublime scene, when there were thunderings and lightnings and a thick cloud upon the mount; when Moses brought forth the people out of the camp to meet with God, and the Lord descended upon the smoking mountain in fire; when the voice of a trumpet sounded long, and waxed louder and louder as Moses spake, and God answered him with a voice—and tell me if memory treasures another emotion like this.

“I have wandered with delight over the battle-field of Wagram, where Napoleon brought to his feet the most powerful monarch of the world. Leipsic had a melancholy charm for me, as the spot where Fortune united with allied Europe to put down her petted favorite. I felt a deep interest in gazing upon the plain of Waterloo, where that gigantic power expired, which had toppled kings from their thrones and made emperors tremble. These, thrillingly interesting as they were, are but scenes in the destiny of a man. Great as he was, he was but mortal. But Mount Sinai is hallowed by the presence of God himself—it is the first scene connected with the salvation of man through the intervention of his Maker.

“After toiling to the highest peak of Mount Sinai, a mile and a half above the level of the sea, I gazed on every side upon widespread desolation. Far as the eye could reach, there was but a succession of sandy valleys, and dark bleak mountains. It is a spot divinely chosen for the delivery of those two great tables which, for so many centuries, have formed the basis of all law, human and divine. Apart from every other nation, so far removed from all the vices and follies of men, He brought them to Mount Sinai to hold communion with his chosen people, through His prophet. There was nothing in the surrounding scenes to distract their thoughts, or to harden their hearts against His counsels; no idolatrous neighbors to lead them astray; no worldly pleasures to amuse, no beauties of nature to attract. Bleak and desolate, Mount Sinai seems a spot made for an interview like that between the Almighty and Moses. The vast solitude by which it is surrounded had prepared the hearts of the people, by its immensity, for the reception of the solemn charge about to be given them. In a desert waste so boundless, they had experienced a sense of their own littleness, and been bowed before the power of the Lord. All in the holy mountain itself is silent, barren, and desolate. Not a sound was heard; no living thing was seen; no verdure decked the granite crags of the mountain—all seemed to have been blasted by that dazzling halo,



upon which no man could look and live; and the rocks, which were scathed by the sacred lightnings of God, appeared freed from nature's laws, and refuse to yield, like common earth, the refreshing beauties of vegetation.

"The ten commandments have never seemed so impressive as when I read them amidst the rugged scene of their production. Their simple eloquence and powerful brevity were in accordance with the unadorned grandeur of all around. Stripped of the worldly ornaments of elocution, like those towering rocks that bear no flowers, they startle us into admiration by their very boldness. Their elevated tone and imposing diction soar above all rules of rhetoric, as the gloomy majesty of the mountain scorns the soft beauties of foliage and flowers. Surely nothing less than divine eloquence could condense into three hundred and twenty words the laws by which empires are governed and nations saved. Their brevity is beauty—their eloquence is the absence of all show.

"It was the evening of the eleventh day from Cairo, after a long and fatiguing march, that our caravan entered the immense valley in which the hosts of Israel encamped before the mount. The sun was hidden from view, but his parting rays still played about the highest peak of Sinai. Never shall I forget the feelings with which I looked for the first time upon the sacred mountain, thus illuminated by the rays of declining day. All else around was dark; deep shadows enveloped mountains and valley; but a gleam of light, like the Christian's hope, still rested upon the summit of Mount Sinai. The heart that could gaze unmoved upon a scene like this must be callous indeed. With me every feeling was hushed into awe; I almost feared to advance. There was something so terrifically grand in the history and appearance of the mountain, that I felt transfixed to the spot; something in its frowning aspect seemed to forbid nearer approach; I felt my own unworthiness to do more than look upon it from afar off."

Permit me, gentlemen, to read you one more extract from his "Letters from three Continents." The letter is written from that scene of the deepest interest to man the world has ever known—the Mount of Calvary:

"A man's deep emotions on visiting the church of the Holy Sepulchre are chilled, not smothered, by the glare and glitter of the tasteless ornaments and images that load the hallowed spots within. I turned at once to Calvary, and mounted the steps where our fainting Saviour toiled up the rocky hill, when, turning to the women that bewailed and lamented him, he said, in mournful forgetfulness of his own sufferings—'Daughters of Jerusalem, weep not for me, but weep for yourselves and for your children.' 'For behold, the days are coming in which they shall say, Blessed are the barren, and the wombs that never bare, and the paps which never gave suck.' I stood upon the spot where our Lord was nailed to



the cross—the rock in which the cross was planted was before me; and amidst the gloom and silence of the dimly-lighted chapel I could almost imagine the fearful scene of the crucifixion, when ‘the sun was darkened, and the veil of the temple rent in the midst.’ I could almost see the two malefactors that were crucified with him, ‘on either side one, and Jesus in the midst.’ I could hear the hootings and revilings of the enraged multitude, and that beautiful sentiment of forgiving meekness—‘Father, forgive them; they not know what they do.’ I could see the crowds of women that had followed him from Galilee, ‘beholding afar off,’ and witness the fierce determination of the soldiers. I could hear that cry of mortal agony—‘My God; my God; why hast thou forsaken me?’ And all was over. What could be more impressive than such recollections in such a place?

“My heart was softened even to weakness, and I could almost have wept; for that religious fervor, which even the most worldly may feel on Calvary, was blended in my heart with the feeling of earth most akin of heaven—a son’s devotion to his mother. The Bible, from which I read the mournful story of the cross and passion, was her parting gift. It flooded my heart with hallowed associations—thoughts of her and of heaven were blended in my soul, and purified each other. It recalled the never-to-be-forgotten instructions of my early childhood, when, leaning upon her lap, I heard from her loved lips explanations of the holy events of which I now read, upon the very spot where they occurred. It recalled the recollections of later days, when, side by side, we sat in the village church—the exquisite music of those simple hymns, that we sang from the same book, seemed again to swell upon my ears, and I was a child in feeling once more. And, whatever may have been my course since, those early impressions of piety have never been effaced, and the religious associations connected with those blissful days of innocence I now found had not died, but only slumbered, and but required a sacred spot like this to start into life, linked with a mother’s holy name.”

Gentlemen, it is impossible that a heart like that of the prisoner, depicted in these lines, is capable of entertaining malice. His devotion to his fellow men, his devotion to his mother, his devotion to his God, all, all forbid the idea that he is capable of entertaining malice against any human creature. The act with which he is charged was the result of dire necessity, it was not an act of wilfulness.

Gentlemen, the fate of my client will soon be committed to your hands. What a responsibility will then rest upon you. Life or death is involved in the issue. What inexpressible joy a verdict for life will bring with it! This beautiful world

will to him as well as to those who are bound to him by such tender ties present scenes of happiness and gladness. But, oh, what gloom, what sadness, what misery would a verdict of death bring with it! That young and beautiful wife, the partner of his former joys, the participator of his woes, to know that her husband is to be assigned to an ignominious grave! That mother whose life has been a life of devotion to him to have her heart riven by sorrow that can never be subdued—that family and wide and extended circle of friends, of which he is the rose and pride, to be crushed down forever—I cannot anticipate such a result. The evidence will not warrant such a verdict, and such an one will not, cannot be rendered by you.

The achievements of this young man in the field of literature are part and parcel of the greatness of Kentucky. The emanations of his mind have added fresh glory to the history of our State, which the patriotic devotion of his ancestry had already rendered so illustrious.

Shame not the history of our State with the pronouncement of guilty, because neither justice, law, nor humanity demand such a result. I have done.

MR. CRITTENDEN, FOR THE DEFENSE.

Gentlemen of the Jury: I agree with the counsel who have spoken on behalf of the prosecution, as to the importance of this case. Its magnitude can scarcely be overrated. The State has an interest in it. It is not a desire for vengeance; the State seeks no vengeance against its own citizens. But its interest is a paternal one, like that of a father in the midst of his family. Its interest is, that its laws may be administered, and that its citizens shall receive from that administration a just and merciful protection.

The defendant has an interest in it. He has everything at stake—his life, his liberty, his character, and the feelings and sympathies of those who by ties of friendship or of nature are associated and allied with him. All these are at stake;

and you are the men who have been selected to arbitrate and decide this mighty issue.

Gentlemen, we have all cause to rejoice that we live under a government which guarantees to every man the right of trial by jury. Without it, no freeman can be touched in life or liberty. For ages this right has been the inheritance of our race. Our progenitors established it in the old world; and our fathers have struggled for it, as a thing indispensable to the security of their lives and their liberties.

You may wonder why it is they have been thus solicitous to preserve this right of trial by jury. You may inquire why they have not rather left it to the courts to try men who are charged with crime. The judges on the bench are usually able and honest men—men of superior wisdom to those who ordinarily compose a jury; men with greater knowledge of law, and men of undoubted integrity.

It is not so much from any distrust of the judges, or fears that they might be swayed improperly, that this right has been preserved; but from a deeper and wiser motive. It is not because the people are equally learned with them, but because they are less learned. It is because the law desires no man to be molested in his life or liberty until the popular sanction has been given to his sentence, and his cause pronounced upon by a jury of his peers. The Court is expected to render all necessary assistance in stating the law; but his cause, in passing through the minds and hearts of his equals who are trying it, will be divested of all nice technicalities and subtle analogies, and decided on its simple merits, and according to the dictates of reason.

The life of a man should be taken on no other judgment. You may lay down the law like a problem in Euclid; you may take one fact here and another there; connect this principle and that proposition, and then from one to the other reason plausibly and even logically that a man should receive sentence of death. But it was to avoid all this that this glorious right has been kept inviolate. It was to bring the accused face to face with his accusers, and to suffer only a jury of his

equals, with their warm hearts and honest minds, to pronounce upon a cause involving his life or his liberty. This, gentlemen, as I understand it, is the object of jury trials. Were cases left to the judgment of the courts, a man's destiny might depend on some subtle and difficult question of law, but now it is different. When you consider a case, it is divested of all such questions, and appeals to you as able to judge of the facts—as familiar with the passions and motives of men—as those who will rest it on its simple merits alone, and will only condemn for reasons that are sure, and solid, and satisfactory to your own understandings.

You are a jury of Kentuckians; and I have too much respect for you, too much respect for myself, in this important case, to deal with you by means of entreaty or flattery. But I may say that I have confidence in you, and that I look forward with sanguine hopes to the verdict you are to render. I expect you to do your duty manfully and firmly; and I expect you to do it, notwithstanding all that has been said to the contrary, mercifully. I expect you to do it on principles compatible with public security, and it is my duty to show you that you may acquit the prisoner at bar on such principles.

The accused is before you in a house of Kentucky justice, and all vengeance must cease to pursue him, at this threshold. This is his sanctuary—here the sway of the law is potent. Here the voice of justice—justice tempered with mercy—is heard—that voice which falls in sounds of terror on the guilty heart; but whispers in songs of seraphs, peace and joy to the innocent.

The case, gentlemen, is one that demands all your attention. Thus far it has engrossed it; for I never have had the honor of addressing a jury in any case, who have given, during its whole progress, evidence of more patient and unwearied attention. I am consoled by the belief that you know the evidence as well or better than I do; and I only ask that you will weigh it carefully in all its bearings and influence, making the proper discriminations, earnestly striving to as-

certain the real motive of this accused; and then render that verdict which is demanded by your oaths and the laws of your land.

I will first proceed to an examination of the evidence, and will then endeavor to bring to your attention the law I believe applicable to it. And I hope to satisfy you that the law when applied to the facts, entitles the defendant to a verdict of acquittal—a verdict which, under all the circumstances of the case, would cause Mercy herself to rejoice.

What, then, is the case, briefly stated? William Ward, a boy of fifteen years, and a scholar in the Louisville High School, returns home during the absence of his parents, and informs his elder brother that he has been unjustly and severely whipped, by Mr. Butler, the principal. “And though I could have borne that, brother,” he says, “I could not well bear to be called a liar before the whole school—my companions and my equals. I wish you would go and see Mr. Butler about it.” It is 4 o’clock in the evening when he gives his brother information of the chastisement he deemed so cruel and unjust, accompanied by such an appeal. That brother—the prisoner at the bar—determines to go around at once, and ask an explanation; but supposing the school to be dismissed and the teacher not present at that hour, he concludes to wait until the following morning. Then the parents have reached home, but as the occurrence took place during their absence, he obtains the consent of the father to go around and ascertain the reason of it. He goes, and in a conflict in which he becomes involved, the death of Mr. Butler ensues. This is a general view of the case; but it is necessary for us to examine it more particularly.

The purpose for which he went to the school house was undoubtedly a lawful one. If a child is whipped, particularly when the chastisement is so severe as to leave marks upon the limbs, I ask if it is not only lawful, but in fact a paternal duty, to go and inquire the cause and learn why such punishment was administered? Certainly it is. And it is equally lawful and proper for the brother to go, especially when, as

in this case, he has the consent and sanction of the father. The accused then stood in the place of the father, and had the paternal right to go on the errand that took him to the school house. This point I consider settled.

Why, then, are we to infer a malicious and wicked motive on his part, for doing that which is clearly lawful, and justifiable and proper? The correct presumption would certainly be, that the motive was as good and lawful as the act itself. It is contended that he went with malice; but you have heard the testimony on this point—you have heard that of Mrs. Robert J. Ward—given in a tone and manner that must have carried conviction to your hearts; and you know what inducements and reasons there were for the defendant to seek an interview with Prof. Butler. You have heard that the parents had just returned from Cincinnati, when the watchful eye of the mother observed Willie at home, and she asked why he was not at school. The little fellow, still mortified at the memory of his own shame, burst into tears, and replied, "Brother Matt. will tell you." And that brother did tell her, adding, "I have designed to have gone around to seek an explanation last night, but the hour was so late that the school was not in session; so I postponed it until this morning." When the father proposed that he should go, the accused replied, "This occurred while you were away, and I was here; and I think, father, you ought to let me go." And, in fact, during the absence of the father, the accused was the head of the family.

It was decided that he should go; and then Mrs. Ward indulged in one of those maternal anxieties and apprehensions, that so often rise in the heart of the mother. He endeavored to quiet them, but when he was at the door, she suggested that Robert should go with him. He had made no request of the kind; he was not desirous of the company or assistance of his brother; but on the contrary, when it was urged upon him, replied, "I apprehend no difficulty; Mr. Butler is a gentleman; and as I only ask what justice demands, I am sure he will do all I desire." Gentlemen, I think

this is no unimportant fact in tracing the motives of the prisoner. Even, at last, when he submitted to the proposition that his brother should go, it was with impatience. He was reminded that Sturgus was his enemy, yet he went, knowing the justice of his intentions, and fearing neither Sturgus nor anyone else; only acceding to the request of his mother to quiet her own apprehensions.

This, I think, is a fair statement of the case. I desire to learn why and wherefore he went to the school house, and what were the motives that actuated him. And, I think, every circumstance speaks out, that there was no wickedness in his heart; that he not only went to do what was proper and lawful, but to perform a duty that devolved upon him. Did Mr. Robert Ward apprehend difficulty? Certainly not; he knew Butler—knew the object and feelings of the accused; he swears to you that if he had even conjectured difficulty might ensue, he would have gone himself. And that mother—can you believe that when she parted with him at the door, she thought she was sending her son on an errand of blood, a mission of revenge? The idea is too horrible to contemplate. Neither the father nor mother expected the least difficulty with Butler, though the prudent apprehensions of the latter suggested that there might possibly be some interference on the part of Sturgus. But Ward and Butler were friends—they had mutual respect for each other.

Well, they left the house—Willie going along to get his books, and Robert, at the instance of his mother. What was the conversation on the way? It may tend to throw some light on the question at issue. The testimony of Robert Ward, gentlemen, may require hereafter more attention than I can give it at this point. But for the present, it is sufficient to state that he did not know that his brother was armed, and that he had not the least expectation of difficulty. On the way, Matt. tells him—it was not all detailed here, but this was evidently the burden of the conversation: “I am going to seek explanation and apology for an injury done to brother Willie. I did not want you with me; you are young and

hasty; you do not know the circumstances of the case, and you might act indiscreetly. I apprehend no difficulty—Butler is a gentleman and will do what is right; and I desire you not to have a word to say.” It was as much as to say, “I would you were at home, Robert, but now you are here; do not interfere by word or deed.” But little Willie, who has heard this injunction, says: “Ah, brother, but Mr. Sturgus is there!”—not Butler, but Sturgus—“and you know he has a big stick!” Matt. replies: “Why, I shall have nothing to do with Sturgus—my application is to Butler.” Then he turns to Robert, and adds: “If, however, Sturgus and Butler both attack me, you may interfere.” He conjectured the possibility of this only to soothe the feelings of the little boy. He had already made Robert passive; but listening to the suggestion, must excite his anxious and brotherly apprehension; therefore, he said: “If such a thing does occur—which I do not expect—you may keep off Sturgus.”

Does this look like an intention to commit murder? On the contrary, do not all these circumstances go to exclude the idea of any hostile feeling, any malignant purpose, or any design to attack, or do an unlawful act, on the part of the accused? Further, to prove that there is no possibility of malice, we have shown you how he had been making preparations for several days, and even on that very morning, to depart for his plantation in Arkansas. His mind was not bent on mischief, but engaged in a legitimate and proper channel. All the facts go to negative the presumption of malice, or of any wicked purpose.

But he had been told, and he knew before, that Sturgus was his enemy. He knew that by some remote possibility the visit might lead to a collision and combat with him. He was very weak—utterly unable to resist any attack that might be made upon him; and therefore it was right for him to arm himself. Is it to be inferred, because a man purchases a pistol, and puts it in his pocket, that he intends to commit murder, unless it is indicated by some subsequent act? You are often in town, perhaps, and if you purchase a rifle there, will that



fact subject you to any suspicion? But in town the procuring of pistols is neither more remarkable nor more improper. It is true that when he buys pistols, a man may do it with an intention to commit murder; yet when he does an act which may be accounted for lawfully in a thousand ways, but by a possibility may be improper and unlawful, is it right for us to conclude that he must be actuated by the worst possible motives that can be conjectured? In such a case, we would be accusing spirits indeed. What would be the condition of human society—what the relations of man to man were this doctrine carried out?

A man may arm himself for a case of probable danger; he may do it with view to no specific occurrence, and he may do it in self-defense. Who can object to it? The Constitution guarantees to every man the right to bear arms. No law takes it away, and none ever can. The right of self-defense is an inherent one, given by God, to man. It is our own natural right, and as Blackstone says, no human legislation can ever take it from us. But how nugatory and vain you render this right, if, when in pursuance of the laws of his country, a man arms himself for any possible contingency, and remote danger, you impute to him unlawful motives, and subject him to every sort of imputation of murderous intent.

This precaution on the part of my client indicated no intention of violence. It may have indicated a purpose to defend himself in case of attack; but nothing more. Will you cast aside the thousand other natural constructions, and adhere to that irrational and unsupported one, which makes him criminal? That were alike unreasonable and inhuman. But take all the circumstances, and weigh them carefully, and you will see the motive as clearly as you see the act itself; and you will see no design to take life, or to violate the laws of the land.

Then what was the remainder of the conversation on the way? They met a young lady in bloomer costume, and talked of the peculiar nature and fashion of that dress. What a subject for the conversation of a man within a few steps of

the point where he intends to commit a malicious and cold-blooded murder!

One of the gentlemen who addressed you for the prosecution announced, in the course of his argument, his disbelief that the accused purchased the pistols with the design to commit murder, or went to the school house for that purpose. If he did not, he had no criminal intentions. But within half an hour after, the gentleman, becoming more deeply engaged, says, with violent gesticulations: "Ward purchased those pistols with the intent to murder Butler." Thus he assumes contrary positions, and as both of these declarations are made by the same author, I suppose I have a right to receive which I please. I will choose the one, then, that I believe takes the only reasonable and truthful ground—that he had no such intent. But I will go no further on this point. I think it is fully established, that the purpose for which my client visited the school house, was a proper and lawful one. So far, then, we find no offense; when he entered the door he was free from all malice and all criminality. Did anything occur there which made him a murderer? This is the next question for you to consider.

You have heard the testimony as to what transpired at the school house. No one was there, except Matt., Robert and the pupils. Willie was in the room, but so engaged, that he knew nothing of the interview. To prove the nature of that interview, thirteen boys have been introduced here by the Commonwealth. Now, gentlemen, before I say a word as to the testimony of these pupils, I wish to have my position clearly understood. The counsel on the other side, with a triumphant air, have come forward and volunteered a defense of the truthfulness and veracity of these boys. But their services have been in advance of any occasion for them—they have only defended what is not attacked at all. Not one of the counsel for the defense has ever intended, or sought to impeach, the character of these witnesses. It may be asked, then, what circumstances justify us in the ground we assume, as to their testimony? It must be remembered they are but

a set of boys, and that they are testifying in regard to a circumstance in which their teacher was killed. They must have been under the influence of excitement and fright. The time which the accused spent in the school room was at most, not more than five or ten minutes. When he entered, they were engaged in their studies, and it was contrary to an explicit regulation of the school, to turn around and look up, when strangers came in. And when, so unexpectedly, like a flame from the earth, this fearful occurrence broke out in the stillness of that school room, what must have been the panic of these boys! You can imagine as well as I. It would have startled men—the calmest and firmest in this jury box, or this court room. Benedict, I think, gives a very just idea of the condition of all of them. He says: “I was so much frightened, that I couldn’t think of anything or see anything hardly.” And whatever the gentlemen may contend, I believe this was the state of all the boys in the room. They may have seen Butler and Ward during the conversation in the early part of the interview; but this was all they saw clearly. One fact alone is sufficient to diminish the weight of their testimony. Not one of them heard all the conversation perfectly. Though one or two are confident that they did, they are contradicted by the others, who heard words and sentences which never reached their ears. No two of them give the same account of it; but on the contrary, there is much inconsistency and contradiction. It is evident that no one of them saw all the acts, or heard all the conversation that passed; and this, in addition to the general panic that agitated their minds, and confused their recollections, renders it impossible for them to give a fair and perfect history of the occurrence.

“Ah,” say the gentlemen, “but the panic was all after the firing of the pistol. Before this, up to the very moment when it took place, they can remember distinctly all that occurred.” Is this rational? Is it according to the philosophy of the human mind? Was not the whole mind agitated and stirred, so that the things both immediately preceding and imme-

diately succeeding, were thrown into one mass of chaotic confusion? There is no other reasonable inference from the facts. Here, then, a parcel of school boys are brought up under these circumstances, to testify in a case of life and death—to testify in regard to a conversation partly heard and acts partly seen. It becomes important that you should know with just how much confidence and with just how much allowance to receive their testimony. Suppose an affray were to occur here now, in this crowded courtroom, and the life of one of the parties to be suddenly taken. How many of the men who are present and witnessed it, could give a correct and faithful account of the occurrence five minutes after it transpired? You know the character of the human mind, and you know that very few could do it. Transfer it in your minds, then, to the presence only of a parcel of frightened school boys; and after months have passed, do you believe they are capable of giving a full history of the affair, detailing all the events in the precise order in which they occurred, and even descending to the minutiae of the position of the hands? The mind, and particularly the youthful mind, under such circumstances is in a state of chaos, and the memory and the imagination combine, until it is impossible to unravel the tangled web and come at the simple truth. I believe these boys to be intelligent, and honest, and high-minded, and incapable of any intentional misrepresentation. But I believe at the same time that they are incapable of narrating the simple, uncolored circumstances of the case, and of giving testimony on which the life of a man ought to depend.

Another thing: These boys, from 11 to 18 years of age, since the occurrence of the principal fact we are investigating, have been the scholars, and under the tuition and training of Mr. Sturgus. With all their natural sympathies on the side of their teacher—with all these other circumstances tending to give their minds a bias, they have been from that day to this under the authority and instruction of Sturgus, the enemy of Mr. Ward—the pursuer of this prisoner. You, who understand the affairs of men, will see the impossibility of a

fair and faithful narration of the event from them, under such circumstances. You well understand how this man—they not knowing it—by a word properly thrown in, or a statement repeated until they were familiar with it and received it without question, may have exercised great influence and control over the feelings and recollection of these boys. He is their teacher and guardian—they are under his charge, and though he was sworn here as a witness for the Commonwealth, he was not introduced upon the stand. Put all these facts together—and it is your business where the facts are not all known, but a few of potent character are established, to infer the others—weigh them carefully in your own minds; and then judge for yourselves if the probabilities in regard to the character of the testimony of these boys are not all in favor of the assumption I have made.

Now, let us examine the testimony. After the able manner in which it has already been reviewed and considered, it would consume too much of your time to enter into a minute repetition of its details; but I think I may safely say that from beginning to end, no two of these witnesses have perfectly agreed; that their statements contain numerous discrepancies and contradictions; that the account of no one of them is probable and satisfactory, and that they all show, from their disjointed nature, they only contain portions and fragments of the facts that occurred.

If there be any one thing in which there is more concurrence than on other points, it is in the statement that when the parties had exchanged salutations, Ward immediately asked, “Which is the more to blame?” etc. Now, would not this be a most extraordinary manner for one gentleman to commence a conversation with another? But four or five of them agree on this point, and if you receive their testimony, you must conclude there was no other introduction of the subject, but that these were the first words uttered by the prisoner. Is it reasonable? Does not the very awkwardness of the question, asked in such a manner, indicate a chasm here—something which did not reach their ears—some prelim-

inary, if not for the sake of ordinary courtesy, at least to give a comprehensible explanation of the business? And what says Robert Ward on this point? He tells you that Matt. first informed Butler he desired some conversation with him; and after declining to enter the private room, giving as a reason that the event of which he wished to speak had occurred there, went on to inquire what were his ideas of justice, and then propounded the question mentioned, which in that connection came naturally enough. Thus in the very commencement, Robert Ward gives you the only natural and satisfactory account of the conversation; and this fact alone is sufficient to show you the fragmentary character of the information possessed by the other boys. I know Robert stands here in a position which, by the law, exposes him to imputation; and it is your duty to weigh his testimony carefully, and not to receive it, unless you perceive in it intrinsic indications of truth, or it is corroborated by other witnesses of whose veracity you can entertain no doubt. In this case, we call the witnesses of our enemy to corroborate him, and contend that even by them, he is so fully sustained as to be entitled to your belief.

One of the largest of these boys, and one who heard more of the conversation than any other witness who deposed for the Commonwealth, was Worthington. Yet he did not hear Ward make use of the term "liar" at all, and thus he corroborates the statements of Robert. Again, Robert tells you that the accused introduced the conversation in a natural and reasonable manner, by asking, "Mr. Butler, what are your ideas of justice?" Now, how is it that of these thirteen boys, twelve leave this entirely out in their history of the conversation? How is it that, if their opportunities for hearing and seeing were as good, and their recollections as perfect as you are asked to believe, they all disclaim any knowledge of this language? But let us turn for a moment to the testimony of little Pirtle, who frankly confesses he did not hear all that was said, and who was one of the finest and most intelligent boys in the whole school. He tells you that the first

words he heard from the accused were something about "ideas of justice" and chestnuts. You must observe that the connection of subjects is a very singular one—one that would not be likely to be suggested to the mind of a school boy or anyone else, unless he had distinctly heard it. The minuteness with which this trivial point is recollected seems to give it more weight, and to indicate in no unimportant degree the truthfulness of the testimony given you by Robert Ward.

Crawford corroborates him by the fact that he did not hear the lie given. Benedict states that when interrogating Butler, Matt. asked, "Which is the worse, the boy?" etc., though all the other scholars state that he used the term "puppy." Now Robert tells you that when he asked the question the first time, he did so in the words detailed by Benedict; but that when no answer was given, he repeated it in some irritation, and then changed the phraseology to "the contemptible little puppy." Though the particular may seem trivial, yet I think all these minute facts combined will enable you to form a correct opinion as to the general character of his testimony.

Quigley confirms him. He tells you that Ward was forced back by Butler, before the pistol was fired, against the wall and the door. Is not this a corroboration, that when Sturgus came out of his room Robert told him to stand back—not that he told him to come on, as related by some of the other boys. The statement of Quigley as to the condition to which Butler had reduced Ward agrees exactly with that of Robert, word for word.

Campbell, however, contradicts Quigley in regard to the language used by Robert to Sturgus; and there are other contradictions between the boys on various points. I might pursue the subject further, but I believe it is unnecessary. I think I have demonstrated that but little reliance can be placed on the testimony of these school boys—because they do not agree—because of their numerous contradictions—because however pure their minds may be, it comes to you through all these circumstances of diminished credit, combined with the fact that they have been so long under the care



of Sturgus, the enemy of Ward—and by that enmity, as I verily believe, the cause of the unfortunate event which occurred.

Let us look at the testimony of Robert Ward; and after what has been shown you, I think it is not asking or saying too much to claim that this is the only testimony which has brought order out of disorder—given the only connected and reasonable account of the whole affair,—a consistent history of the events that transpired—natural in their course, and leading directly to the results that actually occurred.

You have been told that according to the testimony of this witness, the accused told Butler he desired a private conversation with him; but no such word was used, as your own recollection of his language will readily assure you. It was a public investigation he desired, and when invited into the recitation room, he declined, saying, “No, Mr. Butler, the occurrence of which I wish to speak transpired here, and this is the proper place to talk of it.” Could there be anything more natural or more proper than this? There the boy was whipped—there he had been called a liar—and there were all his companions who had witnessed the whole transaction.

Butler might have said, “Here are the boys; they witnessed the occurrence, they know all the facts of it, and they shall be called up and the truth of the matter ascertained, to your satisfaction.” What was it they wished to ascertain? Merely whether Willie gave the chestnuts before or after the recitation order. If before, he had done no wrong and deserved no punishment; if after, he had violated the regulations of the school and was culpable. So upon that fact the whole question depended. What remained then for Butler to do, but to call up the boys, investigate the matter thoroughly, and, if he had done wrong, make that atonement which was due the injured feelings of the little boy? Would not a father have done the same? If in a moment of unreflecting haste and anger, he had whipped his son and called him a liar, and the boy had afterwards come to him, asserting that he had done him a wrong, and desiring him to examine the evidence carefully



and satisfy himself that this was the case—would he not have done it? With an overflow of paternal feeling and love, would he not readily go into the investigation, and gladly learn that even though he had acted hastily and wrong, his opinion of his son was unjust and incorrect?

If the request had been preferred to a stranger, even he should have acceded to it as an act of simple justice. And in view of the paternal relations of the teacher—in view, too, of the intimate and friendly relations of this teacher—when the proper person came to ask it, there should have been no assumption of dignity—no buttoning of the coat and haughty refusal to be interrogated. Would it not have been more in accordance with reason and justice—more in accordance with the real character of the excellent Mr. Butler, even if the question was propounded in a manner not exactly agreeable to his feelings—to have replied, “I will gladly do as you desire, and if I prove to have been in the wrong, no man living shall be more prompt to make the necessary atonement.”

Suppose he did see a little irritation in the manner of Mr. Ward, and suppose the method of propounding the question was not exactly compatible with his taste and feelings,—as a good man, as a just man, as a prudent man, ought he not to have said: “I see you are irritated, I know your feelings are aroused, but let us fairly examine the case, and then, if we find I have been in error, I shall be proud to repair the wrong I have done.” Would that have misbecome Prof. Butler? Would it have impaired in any degree the proper and healthful discipline of the school? Not according to my conception of the matter.

But unfortunately he did not take this course. When his attention is first called to the matter, he buttons up his coat and replies: “I am not to be interrogated, sir.” Ward insists upon it: “Mr. Butler, I ask a civil question, and I expect a civil answer?” Which is the worse, the contemptible little puppy who begs chestnuts and then lies about it, or my brother William who gives them to him?” There may be some objection, perhaps, to the language used here—the phraseology

of the first question was better, but an answer was refused to it, and repeating it in a stronger form does not increase the criminality of Mr. Ward. He is assured that no such boy is there. "Then that matter is settled; but why did you call my brother a liar? For that, I must have an apology." As if to say: "I have a just right to an apology—under the circumstances, it is my due." "I have no apology to make." "Is your mind made up on that point?" "It is; I have no apology whatever to make." "Then you must hear my opinion of you—you are a scoundrel and a coward."

And here let us pause for a moment to examine the relative position of the parties at this point. The accused had gone to the school house, for an explanation which was his due; it was utterly refused him, and thus that question was closed. He had then sought an apology; but that was denied him in terms equally emphatic, and that matter also was settled by the reiterated assurance that no apology whatever would be made. Then he used the language he did; and there, as I apprehend, the demonstration closed on the part of Ward; that was all he intended. He felt that his brother had been abused, insulted and outraged, and when all other redress was superciliously denied, he took the only satisfaction that was left him, by applying these terms to Butler. Do the circumstances indicate that he intended to follow it up further? I think not, in the natural course of events. He had retaliated; and there the matter must conclude—there he would have left it to rest forever.

The next step was taken by Butler. They tell you he was an amiable gentleman, and there is no doubt of the fact; but they tell you also that he was a man of spirit. The facts show that he commenced the combat. Ward had reached a point where there was nothing more for him to do. But he was seized by Butler, whose hand grasped his collar or cravat—crushed back against the wall—bent down towards the earth—struck twice in the face to the certain knowledge of the only witness who saw the whole transaction; and then, but not till then, he fired the pistol to free himself from his assailant.

This account of the transaction is perfectly corroborated by Quigley as well as related by Robert Ward. Do you not believe it? Do you not see how it would occur in the reasonable and natural order of things? Even their own witnesses tell you that they knew Butler would not take such language—that when they heard it applied to him they expected a difficulty.

This is the case proved by a portion of the testimony, and I think fully established by the better portion of it. I believe, then, we have clearly settled it, that the first assault was made by Butler—that he promptly and fiercely pursued it until he had placed this defendant in a position where he had good reason to apprehend the most serious bodily harm—in a position of extreme suffering and extreme danger.

Again: does any one doubt that this was a sudden and casual affray? Unexpected by either of the parties, five minutes before it occurred. After some conversation, in which it is true harsh language was used—but it is a settled principle that no language whatever can justify an assault—Ward was suddenly assaulted and attacked; and then, at a time when he was in great peril and suffering, he fired the shot—fired it, as we contend, in self-defense. The only means of protection he used, were the pistol; it is not in proof that he struck a single blow. You see his form—and you can perceive there the most palpable indications of the truth of what you have been told by so many witnesses—his extreme weakness and delicacy. Do you think it probable that one with such a form—in so feeble a condition—would engage hand to hand in conflict with a man of ordinary strength? And according to the testimony of Mr. Joyce you will remember that Mr. Butler was a man of unusual muscular power in the arms.

The only pretense of a blow from the prisoner is founded on the testimony of one of the boys who saw him bring his left hand down with a gesture, and thought he struck, because he then saw Butler move from him. I do not speak of this to impair the testimony of the boy, but merely to show you another indication of the existence of those circumstances and influences that render it impossible for these school boys to give a

faithful and perfect account of the transaction. Can you believe for a moment that a man in the physical condition of this prisoner, in his sober senses, would attempt to combat with any one? Even with his right hand it would be the most perfect folly for him to attempt to give a blow that would injure a child—and do you believe that with his left, he could give one that would cause a man in his full strength and vigor, to fall back? It is utterly impossible. And with this fanciful exception, not one of those thirteen boys saw a blow given on either side. That there were blows cannot be doubted. Butler himself stated it distinctly to every one with whom he conversed in regard to the affray, before his death. And on such conflicting and uncorroborated testimony as this, you are asked to take the life of a fellow being.

Gentlemen, I think I have stated the case fairly. I have certainly endeavored to do so. I have spoken of the testimony as it was given, according to the best of my recollection, and I believe it clearly establishes the fact that this prisoner was reduced to a condition where it was right and lawful for him to avail himself of any means of defense and protection that were within his reach.

Now, what is the law that applies to the case? I shall not trouble you with much of it, and I will endeavor only to call your attention to that which is strictly applicable. Many cases have been cited for your consideration, some of them involving nice distinctions and subtle questions of law, in regard to which even lawyers and judges have hardly been able to satisfy themselves. Is it to be expected, then, that from sources such as these, you must reason and analyze, and deduce the law it is your duty to act upon in a case of such magnitude as this? I think not. I think no conscientious man will desire to do it; and I am quite sure that you prefer to know something of the simple principles on which this great crime of murder is founded, and the circumstances and elements that go to make up its different degrees.

I contend that according to all principles of law, the facts which have been developed in this case, prove the act for which

the prisoner at the bar is arraigned, to be neither murder nor manslaughter, but justifiable homicide. Though the words of the law may not be known to every man, yet the statutes thereof are written in his heart. You know what malicious killing is—what killing in the heat of blood is, and what killing in self-defense is, and your own judgments, as well as your hearts, tell you that there is a wide difference between them. In morals and in law, the criminality of men's conduct depend on the circumstances under which they act, and the motives by which they are actuated.

There is nothing more simple than the principles of Common Law, on the crime of murder. Malice is the essential ingredient. It may be caused by some difficulty and grudge, but it must be indicated in that wicked state of mind—that distempered and depraved condition of heart—which show them to be bent on mischief. When a man kills another, under such circumstances and from such instigation, that is murder. But had this accused any such grudge or malice towards Prof. Butler? None; if he had ill-feeling towards any one, it was towards Sturgus, his enemy; for Butler he had no sentiments but those of friendship and respect. In his own language, he had always found him “a gentleman and a just man.” The act cannot be murder.

But manslaughter—this is another gradation of the crime. When in an unpremeditated difficulty, without malice aforethought, in the heat of passion, one man kills another, it is called manslaughter. The crime is not so aggravated as that of murder, as the malice does not exist; yet it is not excusable, for the heat of passion is no justification for trifling with human life. But the law, making allowance for the weakness and infirmities of our nature, considers this an extenuation, and reduces the offense to manslaughter. Where parties are engaged in combat on equal terms, and there being no occasion to resort to such means, for self-defense and protection, one kills the other, he is guilty of this crime.

But where a man in sudden affray is beaten or assaulted in such a manner as to peril his life, or place him in danger of

great bodily harm, when there is no other way of escape, he has a right to kill his adversary, and the law calls it justifiable homicide—killing in self-defense. The law is very tender of human life, and therefore homicide, even in self-defense, is spoken of by the English authorities as “excusable rather than justifiable.” And thus the definition of it given by Lord Bacon, is, “a blameable necessity.” Yet though blameable, it is a necessity, and it excuses and acquits the party. It is described as “that whereby in a sudden broil, or quarrel, a man may protect himself from assaults or the like, by killing the one who assaults him.” But it must not be used as a cloak for a revengeful and wicked heart, for we are explicitly told that we may “not exercise it, but in cases where sudden and violent suffering would be caused by waiting for the intervention of the law.”

Language cannot be plainer than that of this distinguished author, Judge Blackstone. “And this,” he says, “is the doctrine of universal justice, as well as municipal law.” It is another principle equally well established, that except in cases of extraordinary violence, where it cannot be done without subjecting him to enormous peril, a man must “retreat to the wall,” or to some other impediment which he cannot pass, before he may take the life of his adversary.

Gentlemen, I shall trouble you with but few more extracts from this or any other author. You see in what justifiable homicide consists—you see that you have a right to kill when you cannot otherwise escape death, or severe bodily harm; but that you must exercise this right only in a case of extremity—only in sudden affray—only when subjected to a condition where you can no longer defend yourself but by killing. It is not every blow that necessarily gives the right to take life; if the person be not injured, the blows not severe, and the parties not unequal in physical strength, or the one who is assaulted may retreat without further harm, the homicide is not justifiable.

Cases have been read to you that if a man provoke a contest himself, for the sake of obtaining a pretext to carry out

the malignant and wicked purpose of his heart, and during it, kill his opponent, it is not excusable, but is murder. I think you readily perceive, however, that this principle is totally inapplicable here. If A pursue B with malice, seeking an opportunity to kill, and provoking a quarrel that he may do so, carries out his purpose, the act is murder. Mr. Gibson read to you yesterday a case of this kind; but here the defendant sought no quarrel,—no combat—no difficulty—he sought a reconciliation. With what propriety then do the gentlemen attempt to confound in your minds, cases where men are seeking to exercise the malice of a wicked and revengeful heart, with such an one as this? They have no connection whatever.

It is a well-established principle (Wharton's *American Criminal Law*, p. 311), that "no words will amount to an assault;" and (p. 313), that "no words will justify an assault." Mr. Ward had made no assault; it is true he applied opprobrious words, but they neither constituted nor justified one. The gentlemen have told you here, and their own witnesses have testified to it, that Mr. Butler was a man of courage, who would not receive such language without giving a blow in return. I do not complain of them for showing that he was a man of spirit; but I do contend that they have no reason to look to the law for any justification of his conduct. He had no right under the circumstances to take redress into his own hands—the principle is laid down in so many words. He was first in fault—he made the first assault—Ward was forced back until he could retreat no further—in the literal language of the law he had "been driven to the wall;" and there, pressed back, and bent down and beaten in the face by his adversary, he shot him.

Now, gentlemen, have I not brought this case, not only within the principles, but within the exact words of the law relating to justifiable homicide? And I have not done it by relating to subtleties and technicalities, but I have proved it on the natural and eternal principles of self-defense.

We are told that where there is any other probable mode of

escape, without losing life or receiving serious injury, a man is not justifiable in killing. True; but I am not aware that any such possibility existed here. The prisoner was confined, and beaten as you have heard—Campbell was just taking the tongs, to give his assistance if necessary, and Sturgus also was in motion. I will say no more about the extreme debility and feebleness of the accused, for you know it, and can perceive it. You also know—notwithstanding the assumption of the prosecution—that Butler was a man of more than ordinary muscular power; that he had been for years in the habit of practicing, both in the gymnasium and out of it, those exercises that tend as directly to develope and strengthen the muscles of the arm, as the habitual wielding of the blacksmith's hammer.

The many excellent qualities of the deceased, and his virtuous character, I freely admit—I deplore his death. The ill-fated circumstances that led to it are all before you. That death has been the effect of circumstances—unfortunate circumstances—but without any premeditation or malice on the part of the accused. The same circumstances which show that his hand inflicted the fatal blow, show, from the nature and suddenness of the occasion, that there was none of that malice or wickedness which alone could make it a crime. His character too pleads like an angel's voice, against such an imputation upon him.

In his state of feebleness or irritation, he may have naturally overrated the violence and injury with which he was threatened, and the necessity of protecting and defending himself by shooting the deceased. But surely a man, in such a condition, is not to be sacrificed for a misjudgment of the exact degree of the necessity which warrants him in such a defense.

You will make all just and humane allowances on this subject. You, sitting here in quiet, solemn consideration, must yourselves feel some difficulty in deciding the exact degree of violence with which he was threatened, and the lawful extent of the defense which it justified. How then are you to expect



him to decide those questions, in the strife and passion of the moment?

The decision in Tennessee, to which your attention has been called, establishes the principle that if a man, from good reasons, believes his life or his person to be in danger, he has the right to kill. He must act upon the instant, or not at all—in the heat of passion and conflict, and when his means for observation are limited. The real question here is, whether Matt. Ward, in his feeble and reduced condition, did not apprehend, and that from good reasons, that he was in danger? If he did, there was no guilt—no criminality, and he deserves an acquittal.

The gentlemen for the prosecution have spoken of the declarations of Mr. Butler, on his dying bed. Now the inquiries of Dr. Thomson, were made for the purpose of ascertaining a medical fact. He desired to learn what was the position of Butler when he received the shot; and Butler replied to him that they were clinched. The arm of Prof. Butler was raised, and it was then found that the probe followed the wound, at least for a short distance, when before it did not penetrate at all. This demonstrates anatomically, naturally, necessarily, that Butler and Ward must have been engaged in combat when the fatal event occurred. Why was the hand of Butler raised, if he was not engaged in a struggle? This is the legitimate inference from the testimony given by Dr. Thomson.

But Barlow was present at the same time, and while Dr. Thomson was engaged in taking out his instruments and preparing to attend to his professional duties, he, with a curiosity perfectly natural, inquired how this had happened. A man had been shot down, under peculiar circumstances, and it was not strange that Barlow should follow him to Col. Harney's residence, and ask how it had been brought about. Butler replied: "He gave me the lie and I struck him for it; then he shot me." According to this, Butler admitted that he struck the first blow. It is true he was provoked by the language used; but you have been reminded that neither those nor any other words justify a blow.

But the counsel for the commonwealth contend that Butler could never have made those statements, simply because Dr. Thomson did not hear them. The doctor himself, however, has told you that there were five or six persons in the room; and you can judge for yourselves whether a physician under such circumstances, when his mind was engaged with his professional duties, would be likely to recollect very accurately. Barlow states that he was there; and he was there. He has minutely described the position and clothing of Butler, spoken of the brandy sent for by the physician; and by relating many other facts trivial in themselves, has demonstrated beyond a doubt, that he was present. The conversation Butler held with him was in answer to a direct question to ascertain the history of the occurrence; his reply to Dr. Thomson was to state the scientific fact of the position of his hand.

Well, Barlow has been spoken of in strong terms here—he has been terribly denounced, and if any words could justify an assault, the language that has been applied to him would certainly do so. But it cannot; lawyers as well as other men, have their own peculiar privileges, and I am sure I have no desire to see them diminished. Of the course of the counsel for the prosecution, I admire the most that of Mr. Gibson. Mr. Carpenter's abuse of this witness seemed to be spontaneous—he rejoiced at an opportunity to exercise the peculiar talent he possesses for that style of argument. But Mr. Gibson tells you that he considers it out of place—that he will not indulge in it—and maintaining that the witness is perfectly annihilated, magnanimously informs us that he will not trample on the dead!

I never saw this Barlow before—but how does he appear to you? What impression has this man left whom the lawyers—not the law—not the Court—but a few lawyers, have so earnestly attempted to degrade in your estimation—have cast a ban upon, and excommunicated so peremptorily from the society of all good men? I care very little for his testimony—we had other evidence sufficient to establish the facts he has proved; but I believe all the attacks to be gratuitous and

unjust. He may, in some respects have acted foolishly,—he may have been imprudent, but we have every reason to believe that he is not dishonest. Within half an hour after it occurred, he told Mays and Sullivan of his visit to Col. Harney's and the conversation with Butler and soon after this he related the same fact to Mr. and Mrs. Crenshaw. Yet Mr. Carpenter tells you that he fabricated the story because he was fascinated with the idea of associating in a wealthy and aristocratic family,—because he sought to obtain a view of the interior of the house of Mr. Robert J. Ward. How do they reconcile this with the fact that he then made the same statements which he has made here, to three witnesses of the highest intelligence and respectability? He stands confirmed, as far as a witness can be confirmed; and if any stain has been cast upon him here it has only been done by the lawyers who have made him the subject of their abuse. He has proved the most unexceptionable character, by the Mayor of Louisville and other gentlemen who are above imputation; in the eye of the law and of his fellow-citizens he is perfectly credible, and so far as any testimony he has given in this case is concerned, he may be relied on by you as safely as any other witness who has testified in it.

These statements of Butler to which Barlow has deposed, accord perfectly with the testimony of Robert Ward. You could expect no details from a man under such circumstances and in such a situation as Butler,—he only gave a general description of the occurrence; but Robert has given you the details. And Prof. Yandell, who was present at the same time, does not tell you, like Dr. Thomson, that Ward came to the school house, cursed him, struck him, and shot him; but gives quite another account of his statements. He speaks of him raising his hand, as he thought, to indicate that the accused had elevated his in a threatening manner; but you all know how common the habit of raising the hand in conversation, is with some men. Dr. Thomson, it seems, heard no word of those statements which were made to Prof. Yandell; and the discrepancy between them is not surprising,

for as they were engaged at that moment, the cause of the occurrence was a matter of secondary importance,—not one of peculiar interest to them.

Here, gentlemen, I beg leave to recur for a moment to the circumstance which I must confess has surprised me. It was the general evidence of the school boys that Ward entered the house with his right hand in his pocket, and gesticulated with the fingers of his left. Is it not wonderful that a fact so immaterial—so little likely to attract attention—as the circumstance that a gentleman had his hand in his pocket, and which of the hands he had there, should be remembered with so much accuracy by so many of these witnesses, so long after its occurrence? But you perceive that it has been made a matter of considerable magnitude here. No doubt Sturgus thought it was important to show that the right hand was on the pistol all the time, as if in a sort of conspiracy with it, to act jointly at precisely the proper moment; and rather than destroy this hypothesis, they would have you believe that if the accused struck a blow, it was with his left hand. Now, you can readily perceive why they would like to keep the right hand of Matt. Ward on that pistol during the whole time; and I have no doubt that these boys have ever and anon heard the statement made in so many conversations, held for the purpose of assisting their memories, that they are now convinced the hand really was in that position, and that they saw it there.

Again, they contend that Butler struck, if he struck at all, with the left hand, and therefore that the blows could have inflicted no injury. Now, if his right hand had been so long and so utterly crippled, as they have attempted to show, it must certainly have been a non-combatant, and the left hand must have learned, years before, to perform all the offices of the right. Thus their presumption is effectually destroyed.

You have been sitting here, gentlemen, for eight days. Can you tell whether your hands were in your pocket when you came in this morning, or on any other morning? Can you tell the position of the hands of any of the counsel, as they

rose up to address you, face to face? As you have been seated at home, in your own house, and visitors have entered, can you recollect the position of their hands? Yet a fact so trivial and unimportant at the time—one which could then be of no possible interest—for no difficulty was apprehended until Butler had collared Ward—is related with this minuteness! I would suppose that not another human being in the form of a man ever entered that school room, in regard to whom so many boys can recollect distinctly the position of his hands. Whether the hand was in his breeches or his coat pocket is not a matter of so much importance, and therefore not remembered so well! Gentlemen, you must be convinced that the recollection of such a fact, under such circumstances, is utterly impossible.

And he gesticulated, they say, with his left. Why should he not let the right hand do the right hand's work?—why should it be kept on that pistol? The idea is absurd. All the circumstances show that he at first expected no difficulty? Who believes this? Who does not know that, however unconscious of it the boys may be, this is the work of a strained imagination, suplying the place of a strained memory?

Sturgus, as you have heard, had administered a whipping to the boy on a former occasion, the facts of which we desired to introduce here, but we were not allowed to do so. Is it not probable that, instigated by his enmity towards the Wards, when he heard of this punishment, he advised Butler to refuse all explanation and investigation? The circumstances of the case—the position of Butler and Ward—their friendly relations—the just and reasonable demand that was made—all show the refusal to have been inconsistent with his character and his heart. Is it not a rational inference, then, that he may have been prompted by the sinister, subterranean motives of another man, who desired to minister to his own anger and ill feeling? I think it was not like Butler, when he was asked such a question, by a man he knew so well, and esteemed so highly, to button up his coat and

answer haughtily: "I am not to be interrogated sir." But it *was* like Sturgus.

Gentlemen, I am consuming much of your time, but I believe the case is clearly comprehended by you. I think I have made up the facts and made out the law. I think you are satisfied that the pistol was not fired, so far as we can judge until there was no other way of rescue for the prisoner, from the peril of his life, or of great bodily harm. I think you understand the principle that the law holds all such bloodshed justifiable—though blamable, yet excusable. This, then, is the condition in which the prisoner stands; and upon these plain facts and these great principles, I think I may base my argument.

But there are other points in this case to which I feel it my duty to refer. Notwithstanding the circumstances we have made out, this young man has been persecuted and denounced from the first, as one of the vilest of men, and of murderers. He has been held up to the world as the perpetrator of a deliberate and diabolical outrage—an act of fiendish malignity, for which there was no particle of mitigation. For months and months he has been thus pursued, with misrepresentations and revilings. This version of his case has been spread upon the wings of the wind, through the columns of the press. Now, it matters not in effect whether these publications were made from the basest of motives, or in all sincerity and truth, by those who were deceived by his persecutors—they *were* made. These rumors have gone abroad, anticipating the result of this trial; but you see how little his real case is like the one that has been represented to the world.

His only refuge is in your verdict. Through all this persecution and these revilings he has passed; now, thank God, he waits the decision of your calm judgment. I said his persecution was over; but through those associated with the prosecution of this case with my friend, Mr. Allen, it all seems to have been concentrated here. The first of them, Mr. Carpenter, was eloquent in denunciation of the prisoner. What necessity was there for this? It is his duty to convict,

upon the law and the testimony; but what right has he to turn from you to the accused, and assure him if you do not feel warranted by the facts of the case in finding him guilty, he will be pursued through all time by some horrible monster the speaker's own imagination has conjured up! What unsolicited and perfect insolence to persecute a man, and in case the prosecution cannot be sustained, to threaten him with a fate as cruel as any verdict you can bring. Is this practicing law according to its spirit? Is it necessary, when a prisoner is in the custody of the law, his hands and his tongue tied, for a prosecutor to feed his little vengeance in such a manner as this? Sir, it is intolerable—it was never equalled!

Let us come to a later instance, from our brother and our friend, Mr. Gibson. Was such language ever heard before? Should a man when on trial for his life be denounced as a damned villain, and his act as a damnable crime? Is not this a singular, an improper course to pursue towards an unfortunate prisoner? Is it not alike cruel to him and disrespectful to the jury? Your duty, gentlemen, is too responsible to suffer you to think of the subject in such terms. There is no congruity between your solemn thoughts and such language as this; and I have no fears that you will allow it to influence them.

My friend, Mr. Gibson, is a man of great impulses, and when not excited, of generous impulses. In an early stage of his argument he tells you, more in accordance with the facts, more in accordance with the love of justice existing in his own manly heart, that he believes the accused sought the school house of Prof. Butler without an intention to do violence. But afterwards, when his feelings are more excited, when his impulses are brought up to the prosecuting point, he declared in tones that vibrated through this court room, his belief that he went there to play the part of an Italian assassin. Is not this a little inconsistent? At one time he tells you he shall be glad to see it done, if you can find any satisfactory grounds for his acquittal; and again, that if you do acquit him, he shall believe all the tales he has ever heard,

that justice has fled from the borders of old Kentucky. Furthermore, he would have the bereaved mother train the child of the deceased to follow the track of this prisoner, like a bloodhound and never rest until his hands were red with his blood.

What, would he have that mother, with her heart softened by premature sorrows, instil into the tender mind of the child such horrible instincts as these? Did he really mean this? I am sure he did not; and I only allude to the fact to show with what fierceness and ardor this prosecution has been pursued. It has been carried on with a precipitancy and passion that would not even allow its conductors to keep within the bounds of propriety or consistency.

I now remember another of those flights of Mr. Carpenter, to which, as it involves something more than mere words, I would call your attention. Not satisfied with urging you to do it, in pursuance of what he deems your duty to yourselves and to society, the gentleman asks you to convict this man that it may be an event of joyful remembrance to you when you appear before your Maker. He assures you it will be a great solace and consolation to recollect that when a fellow man was brought before you and his fate consigned to your hands, you convicted him.

He would have you tell the Judge of quick and dead, when you stand at His tribunal, how manfully you performed your duty, by sending your fellow man to the gallows! He apprehends that it will go a great way to insure your acquittal there and your entrance to the regions of eternal bliss, if you are able to state that you regarded no extenuating plea—took no cognizance of the passions and infirmities of our common nature—showed no mercy, but sternly pronounced his irrevocable doom. I understand that it would be more likely to send you in a contrary direction. I understand that a lack of all compassion during life will hardly be a recommendation there. I understand that your own plea will then be for mere mercy; none, we are taught, can find salvation without it—none can be saved on their merits. But accord-



ing to Mr. Carpenter's idea, you are to rely there—not upon that mercy for which we all hope, but on your own merits in convicting Matt. Ward! Don't you think the gentleman rather failed in the argumentative portion of his point? It seems to me he would have done better to take you somewhere else for trial?

I have somewhere heard or read a story from one of those transcendental German writers, which tells us that when the Almighty designed to create man, the various angels of his attributes came in their order before Him and spoke of His purpose. Truth said: "Create him not, Father. He will deny the right—deny his obligations to Thee—and deny the sacred and inviolate truth—therefore create him not." Justice said: "Create him not, Father. He will fill the world with injustice and wrong—he will desecrate Thy holy temple—do deeds of violence and of blood, and in the very first generation he will wantonly slay his brother—therefore create him not." But gentle Mercy knealt by the throne and whispered: "Create him, Father, I will be with him in all his wanderings—I will follow his wayward steps—and by the lessons he shall learn from the experience of his own errors, I will bring him back to Thee." "And thus," concludes the writer, "learn, oh man, mercy to thy fellow man, if thou wouldst bring him back to thee and to God."

Gentlemen, these lawyers have endeavored to induce you to believe that it is a duty you owe even to Mercy herself to convict this prisoner. That you have nothing to do with mercy—that there is a Governor some where, a good, kind-hearted man, who may exercise it if he chooses—but that you have no right to show mercy. And, pray, what are you? Yesterday you were but men—just men, kind men, and merciful men. Tomorrow, when you have left this jury box, you will be the same again; but according to the ideas that have been advanced, you must divest yourself of this attribute when you enter here, and become men of stone—mere mathematical jurors, with no more feelings and sympathies than if you were marble statues. Is this right of trial by jury?

Is this the principle our fathers contended for, fought for, died for? If it be, I can only say it is not worth the struggles that have been made for it.

It is a merciful law, gentlemen, you are called upon to administer. I desire to see you do your duty. I desire that the law should be obeyed and enforced; but in the matter of the facts you have the exclusive right to judge. I agree with the gentlemen, that you have no right to show mercy where the facts will not warrant it; but it is your duty alone to consider these facts, put them together, and upon them found your verdict. In examining these facts, may not one judge of them more kindly, and hence ascribe better motives than another? The consideration of the facts and the causes that produced them, is the proper place for mercy to be applied. The law says the murderer shall be punished; but it is your province to ascertain what constitutes the murderer.

You have a solemn duty to perform, and I want you to perform it. I want you to perform it like men—like honest men. I ask your sober judgment on the case, but it is right for the judgment to be tempered with mercy. It is according to the principles of law, one of whose maxims tells you it were better for one hundred guilty men to escape than for an innocent one to be punished. Is not here your commission for mercy? It is alike your honest minds and your warm hearts that constitute you the glorious tribunal you are—that make this jury of peers one of the noblest institutions of our country and our age. But the gentlemen would make you a set of legal logicians—calculators, who are to come to your conclusions by the same steps a shop-keeper takes to ascertain the quantity of coffee he has sold by the pound. That may be a jury in name, but it is in nothing else.

But I wish to call your attention to another fact that figures in this case. Mr. Carpenter, with more adroitness than Mr. Gibson, but with less scrupulousness, has attempted to create a prejudice against this prisoner, by speaking of his family as aristocratic—as believing themselves better than ordinary mortals. I suppose I feel no personal offense at

this, for I have always belonged to that class usually called poor men. But in this country, no man can be above a free-man, and we are truthfully told that "poor and content is right enough."

Do you not see the object of all this, when the gentleman speaks, in his peculiar tone, of "Ward House," and tells you that "a Ward had insulted—a Ward had been whipped, and therefore the stain must be wiped out with blood?" Do you not detect the low, unjust unrepudican attempt to create a prejudice against this prisoner? What right have they to do this? The charge is personally an outrage upon him—the assumption is false. And we all know that before our laws, every man, whether he come from the cabin or parlor—whether he be rich or poor—holds the same position, has the same rights and the same liabilities with all other men. Why then attempt to excite this low, vulgar feeling towards Mr. Ward?—why seek thus to prejudice your minds against him and his? I am sure that if the gentleman expected any response to such low, envious sentiments in your hearts, he made a grave mistake. There may be those who hate all men they are unable to imitate; but you, I presume, are willing to see all your countrymen enjoy any position they have honorably obtained in whatever manner they please.

In conclusion, gentlemen, I beg leave to call your attention to an important consideration, bearing on the whole case, and affording a key, I think, to the heart of this young man. I allude to his general character and disposition through life. I need not call your attention to what we have shown it; it is all perfect in your recollection. I have no occasion to exaggerate; he has shown, in the clearest and most conclusive manner, a character of which you or I, or any man living, might be proud. As in boyhood, so in manhood. His riper years only exhibited to the world the amiable and lovely and genial traits of the boy, more illustriously developed in the man.

I am one of those who believe in blood and in consistency of character. Show me a man that for twenty or thirty years

has been kind and honest and faithful in all the relations of life, and it will require a great deal of evidence to induce me to believe him guilty in any instance of a gross and outrageous wrong. You have seen the character of this man, from his earliest boyhood—so kind, so gentle, so amiable—ever the same, at school and at college, in the city or in the country, among friends or strangers, at home or in foreign lands. There was no affected superiority. You see how mechanics and artisans have been his constant associates and friends. With health impaired, and with literary habits—never seen in drinking saloons or gaming houses—his associations with men of all classes—he has ever been the same mild, frank and unoffending gentleman, respecting the rights of others and only maintaining his own. This is the man you are called upon to convict. His act was an unfortunate one, but it was one he was compelled to do. And though he has been misrepresented and reviled and wronged, I trust it will be your happy privilege by a verdict of acquittal, to vindicate his character in the eyes of all good men, and restore him to that family whose peace, happiness and honor are at stake on your verdict. Your decision must cover them with sorrow and shame, or restore them to happiness that shall send up to Heaven, on your behalf, the warmest gratitude of full and overflowing hearts.

Gentlemen, my task is done; the decision of this case—the fate of this prisoner is in your hands. Guilty or innocent—life or death—whether the captive shall joyfully go free, or be consigned to a disgraceful and ignominious death—all depend on a few words from you. Is there anything in this world more like Omnipotence—more like the power of the Eternal, than that you now possess?

Yes, you are to decide; and as I leave the case with you, I implore you to consider it well and mercifully before you pronounce a verdict of guilty—a verdict which is to cut asunder all the tender cords that bind heart to heart, and to consign this young man in the flower of his days and in the midst of his hopes, to shame and to death. Such a verdict

must often come up in your recollections—must live forever in your minds.

And in after days, when the wild voice of clamor that now fills the air is hushed—when memory shall review this busy scene, should her accusing voice tell you you have dealt hardly with a brother's life,—that you have sent him to death when you have a doubt, whether it is not your duty to restore him to life—O, what a moment that must be—how like a cancer, will that remembrance prey upon your hearts!

But, if on the other hand, having rendered a contrary verdict, you feel that there should have been a conviction,—that sentiment will be easily satisfied; you will say: "If I erred, it was on the side of mercy; thank God, I incurred no hazard by condemning a man I thought innocent." How different the memory from that which may come in any calm moment, by day or by night knocking at the door of your hearts, and reminding you that in a case where you were doubtful, by your verdict you sent an innocent man to disgrace and to death.

Oh, gentlemen, pronounce no such, I beseech you, but on the most certain, clear and solid grounds. If you err, for your own sake, as well as his, keep on the side of humanity, and save him from so dishonorable a fate—preserve yourselves from so bitter a memory. It will not do then, to plead to your consciences any subtle technicalities and nice logic—such cunning of the mind will never satisfy the heart of an honest man. The case must be one that speaks for itself—that requires no reasoning—that without argument appeals to the understanding and strikes conviction into the very heart. Unless it does this, you abuse yourselves—abuse your own consciences, and irrevocably wrong your fellow man by pronouncing him guilty. It is life—it is blood with which you are to deal; and beware that you peril not your own peace.

I am no advocate, gentlemen, of any criminal licentiousness—I desire that society may be protected, that the laws of my country may be obeyed or enforced. Any other state of things I should deplore; but I have examined this case

I think carefully and calmly ; I see much to regret, much that I wish had never happened, but I see no evil intentions and motives, no wicked malignity, and therefore, no murder—no felony.

There is another consideration of which we should not be unmindful. We are all conscious of the infirmities of our nature, we are all subject to them. The law makes an allowance for such infirmities. The Author of our being has been pleased to fashion us out of great and mighty elements which make us but a little lower than the angels; but He has mingled in our composition weakness and passions. Will He punish us for frailties which nature has stamped upon us, or for their necessary results? The distinction between these, and acts that proceed from a wicked and malignant heart, is founded on eternal justice; and in the words of the Psalmist, "He knoweth our frame—He remembereth that we are dust." Shall not the rule He has established be good enough for us to judge by?

Gentlemen, the case is closed. Again I ask you to consider it well before you pronounce a verdict which shall consign this prisoner to a grave of ignomy and dishonor. These are no idle words you have heard so often. This is your fellow citizen—a youth of promise—the rose of his family—the possessor of all kind and virtuous and manly qualities. It is the blood of a Kentuckian you are called upon to shed. The blood that flows in his veins has come down from those noble pioneers who laid the foundations for the greatness and glory of our state—it is the blood of a race who have never spared it when demanded by their country's cause. It is his fate you are to decide. I excite no poor, unmanly sympathy—I appeal to no low, grovelling spirit. He is a man—you are men—and I only want that sympathy which man can give to man.

I will not detain you longer. But you know, and it is right you should, the terrible suspense in which some of these hearts must beat during your absence. It is proper for you to consider this, for in such a case all the feelings of the mind and heart should sit in council together. Your duty is yet to be

done; perform it as you are ready to answer for it, here and hereafter. Perform it calmly and dispassionately, remembering that vengeance can give no satisfaction to any human being. But if you exercise it in this case it will spread black midnight and despair over many aching hearts. May the God of all mercy be with you in your deliberations, assist you in the performance of your duty and teach you to judge your fellow being as you hope to be judged hereafter.

Another word, gentlemen, and I have done. My services in this case were volunteered. I had hardly expected that so unimportant a fact could excite attention or subject me to reproach. What! shall all the friends of this young man be driven from him at such an hour? I had known him from his boyhood—I had known his family from mine. And if, in the recollection of the past—in the memory of our early intercourse—in the ties that bound us together, I thought there was sufficient cause to render it proper, whose business is it? Whom does it concern but my client and myself? I *am* a volunteer—I offered my services—they were accepted, and I have given them in this feeble way.

I thank you kindly for your attention during my long and uninteresting discourse. I only ask that you will examine this case carefully and impartially, for in your justice and your understanding I have deep and abiding confidence.

MR. ALLEN, FOR THE COMMONWEALTH.

Gentlemen of the Jury: In consequence of illness and debility I shall not detain you as long as those who have preceded me. The law and the facts have been gone over and repeated again and again. I have every confidence in your intelligence and watchfulness, and doubt not you are as well posted up in the testimony as the lawyers. But let me assure you that your entertainment has passed. I am exhausted and speak to an exhausted jury. I follow one of our most talented and eloquent men in one of his ablest efforts. While you accept that, you will not reject a feebler effort.

Before entering upon this case, I wish to made a few per-

sonal remarks. The circumstances attending this case have produced a great excitement throughout not only Kentucky but the Union. There has been much speculation about the verdict you would pronounce; also about the course I should pursue. I have been pronounced both the enemy and friend of the prisoner. The fact is I am neither. I have never met him half a dozen times in my life. But, were he either friend or enemy, I think I could administer the law as it requires and march up to the line of duty, even if my steps crushed my heart's strongest impulses. I appear before you as the agent of no man. I am not hired, but appear in the discharge of an official duty. As to the manner I should discharge that duty, I have received no hint from friends or enemies of the deceased.

My first duty, as attorney for the commonwealth, is to lay down the shield of the law in favor of the prisoner. He must be presumed innocent until he is proved guilty, by such testimony as admits of no reasonable doubt. And here, permit me to say, that I differ with Mr. Crittenden in the definition of a reasonable doubt. You may doubt the truth of a witness, his means of knowing that whereof he testifies, etc., but having admitted that, you cannot entertain a reasonable doubt of the fact that testimony establishes. Indeed, it is impossible the jury should have certain knowledge of the guilt of the prisoner. You must attain that through the information of others. If a hundred men swear to a certain fact, and you believe them there is still a doubt. There is a difference between belief and knowledge. Is the doubt still lingering a reasonable one? Though the law does not presume that every killing is necessarily malicious, yet if the fact of the killing be established, it requires less evidence to establish the malice than to establish the killing.

I shall now examine the various positions of the counsel for the defense.

The first great bug-bear is, the public press has inflamed the public mind; that the Louisville Courier and Democrat have poisoned public opinion all over the country. This I



deny; but if the charge were true, other papers have not been silent. The Elizabethtown Register and New York Herald have contained articles in favor of the prisoner, what was their object—to influence the public mind in favor of the prisoner? I have the same right to make this assertion that they have to make theirs. But both classes of papers have failed. Never was there a jury so easily obtained; showing them in what has been called the Commonwealth of Hardin, public opinion has not been poisoned. But it is said that since this trial commenced, inflammatory letters have appeared in those papers, calculated to excite the public. The public are not trying this case, and those letters are excluded from the jury.

Mr. Marshall took the position that Ward had a right to attack Butler, because Butler had called his brother William a liar. And yet, if this is so great a crime in a teacher, who stands in the place of a parent, what shall we think of Ward himself, who goes into the school house, and calls Butler himself a d—n liar. How much worse is Ward than Butler? Besides, the character of Butler is admitted as being good, pious and honest. Then he believed the truth of what he uttered. Yet Matt. calls him a liar. No provocation can excuse such words to such a man. As to the whipping of William, we have not been permitted to show its justice or its extent.

Again, Mr. Marshall states that we charged Ward with wealth, to excite your prejudice. We have shown that, from his position, wealth, and influence, he was able to present his case in its strongest light, and to procure counsel and witnesses. That is all the object we have had in referring to his wealth. In the heat of argument, we cannot always be particular in our expressions, and may say something to hurt the prisoner's feeling. It is necessary to say disagreeable things, but I shall try to use decorous language.

Mr. Marshall has laid down the law, and just to show you how his law sounds, divested of its elegant expressions, I will give it in common language, and it is thus: A man has a right to shoot a fellow if a fellow tries to whip him. That is it, in plain language. Further, he says if a man is pushed back by

another to an obstacle, he may shoot, stab, strike his opponent, no matter who begun the scuffle, or who is in fault. This is a part of the glorious Kentucky law, as yet unsoiled by printer's ink. What is to be the effect of this law? You and I think differently about a proposition. The common law and the statutes should decide the matter. But we refer it to the Kentucky law. You are young and stout, I am weak; I slap you, you run me back, I pop you, because I am run to the wall. It is not necessary to dwell longer on this law, or on Mr. Marshall.

Governor Helm tells us that a man of good character like the prisoner could not have intended murder. A better character than the prisoner has proved I never heard, yet the human heart, who can judge it? This good character is no proof against guilt. Character only goes to make clear what is doubtful. Dr. Webster, of Boston, proved by ministers, lawyers and doctors as good a character as that of the prisoner, yet he committed murder and confessed the crime.

But it is asked, what was the motive of Ward to go to the school house? A code has obtained in Kentucky, not confined to Louisville, but extending throughout the state. It is called the code of honor. If you look in a particular way towards a person, approach a woman supposing her to be an acquaintance, and she is not; tread on another's foot, they are legitimate causes for this code. It contains this peculiar feature, that a man is judge of his own wrongs. Under this code Ward thought an injury had been offered to his family, and he goes to force an apology, and if Butler refuses, he is prepared to take his life. From this code this difficulty arose. Butler was unwilling to explain. The words he used to the little boy were not an insult, because he stood in the place of a father. It was his duty to punish crime in the boy and tell him of it. Boys should be punished as well as men, and this case shows the importance of children being whipped. Mr. Wolfe says he has given injunctions that his children should not be whipped. It is a pity that such commands should be given. I am conscious that I owe much to the numerous floggings I re-

ceived, and perhaps to these the fact should be attributed that I stand here an advocate, not a prisoner.

It is said Matt. Ward had a right to go, because he had been delegated. The father had no power to delegate his authority. Besides, Butler did not know he was delegated. Had the father gone, he would have stepped into the private room and received the explanation. But Matt. insists that he is the one to go; he was young and his father old, as if his father could not talk as well as he about the difficulty.

Governor Helm says he had a choice of pistols when he purchased and got the smallest, that therefore there was no murderous intent. He got a pistol competent, easily concealed, handy for use, a good shooter and a self-cocker. Ward was not a braggadocia, didn't want big pistols to flourish about, kept his weapons concealed till time to use them. We have a right to infer that he anticipated a close fight. Butler was a peace-man, there would be no duel. For a close encounter this was the right kind of pistols.

But Mr. Wolfe says he never saw anything like the course pursued by the prosecution. Now it is for you to judge whether they have acted fairly or not. But they are brought here, he says, by the rattle of shekels of silver. Every lawyer takes a fee, and does the best he can. There has been no unfairness on the part of the prosecution; but I might retort the charge on the defense. What could the commonwealth have done in this case if not assisted? An ordinary man, rich, opposed by fifteen or eighteen lawyers, the pick of the Kentucky bar, what could he have done alone? There are no distinguished men on the part of the prosecution, and if they have quoted the law correctly, there is no matter for explanation.

The right of self-defense has been referred to. It is the right of nature, cannot be taken away, an inestimable right that all should enjoy. But still under pretense of self-defense one should not go, draw out an attack and then kill. Be careful not to permit such an instance to go unpunished. This right of self-defense should not be thus trifled with. But Mr. Wolfe says, if a person slander you or your family and you

go to him, curse him and he attack you, cannot you kill him? I answer, no. If a person slander you, you have redress in the law. That is the remedy, full and ample. It punishes him and restores your character; no violence is recognized by law, except in self-defense. But further; under this code, when a man is judge in his own case, goes, takes the law in his hand, curses, and then shoots, if he can do it in one case, he can in another. The principle won't do, gentlemen, for the government of a great nation.

But there has been an awful assault made on the witnesses in this case, especially on the boys. It is said they have told only what they heard. Severe remarks have been made about Sturgus. He is an estimable man, not very brave, rather inclined to retire from danger. They say he has corrupted the boys so that they have come down and told what they have heard. Mr. Crittenden says he believes much in blood. So do I. The parents of these boys are respectable, and many of them distinguished by high positions in society. Yet it is said they have let Sturgus influence their boys so that they asserted a falsehood. Yet you know nothing of Sturgus. He was brought down as a witness in this case, and would have appeared had Bob been on trial. He knows nothing of this case. When necessary we shall produce him, and he will show Bob's connection with the matter.

Much stress has been laid on Quigley's testimony and on his statement that Butler pushed Ward back. There is a dispute between the counsel respecting his testimony. I have taken notes of his testimony; and in his direct examination he says Butler pushed Ward back to the door; but in his cross-examination he said Ward stepped back but one step. This does not support Bob. Benedict says Ward leaned back. There is a mistake about the position Bob sustains in this matter. We do not assail him; he assails the boys. But take all their statements. If you choose to set aside the thirteen boys and take Bob, it is your privilege. You know his situation. If Matt. is acquitted, Bob goes free. He stands as a witness swearing for family honor, for a brothers' life, and for his

own. The boys have no interest, are respectable, and when they and Bob differ, which will you believe?

But they say Knight cannot be believed, because he withdrew some things on cross-examination which he stated in the direct. But this is on evidence. On his direct examination he stated all he knew; on his cross-examination he was told to state only what he heard. If he had been trained to a story, he would have stuck to it, like a Grayson county tick.

*Mr. Crittenden* said he had not accused the boys of being trained, but of being unconsciously so influenced as to believe things had occurred differently from the reality.

*Mr. Allen.* Then it is admitted they are not suborned; that they are only simple.

*Mr. Crittenden* again explained.

*Mr. Allen.* The boys are admitted, then to be honest and reputable; but they have been influenced by Sturgus. Now, the defense knew what these boys testified in the police court; and, if they had testified differently here, the defense could and would have shown it. The little differences in their statements showed they had not been trained, and confirmed their veracity. Differently situated, in different parts of the room, they saw the transaction in different lights, and tell it just as they saw it. Their testimony makes out a perfect whole, complete in all its parts.

The boys contradict Bob about the running back and the striking. The boys swear positively they saw nothing about a blow, but merely laying the hands on the shoulder. They contradict him about his going up the aisle, menacing the boys and frightening them. They contradict him about the position of the parties. The question is, whom will you believe, the boys of acknowledged good character, or Bob, barely admitted as a witness?

But, *Mr. Crittenden* says the boys were too particular about Ward's right hand. I will tell you how they came to notice that. William Ward had said, Matt. would be there in the morning and give Butler hell. The boys wanted to see what his preparation was for giving him hell.

Again, the defense say that Dr. Thomson cannot be relied on, because his testimony conflicts with Barlow's. Yet when we offered to prove his good character, they admitted it at once; though Mr. Wolfe afterwards asserted that they brought several witnesses to prove Barlow's character, and we but one to prove Thomson's. This was ungenerous, after admitting Thomson's character, and thus precluding us from bringing witnesses to establish it. But Barlow is contradicted by old Mr. Ward, by Thomson and by Knight. This man Barlow is the one who killed himself by his testimony, and Carpenter preached his funeral sermon on Friday last. His conversion was remarkable. One day he proposed to head a mob to take the prisoner from jail and hang him; the next day he is his fast friend. What caused this conversion? I will not say he was bribed; but it is highly probable he expected something, and most likely he expected more than he will ever get. And, now, which of the two, Thomson or Barlow, will you take? Yandell does not contradict Thomson. His impression is, that Butler indicated that Ward cursed him, and then raised his hand to strike him. Thomson had asked the question and was listening to the answer, and Yandell was not so particular. Barlow says the conversation took place before Caldwell and Yandell came. Thomson and Knight say that it occurred afterwards.

Mr. Crittenden says that no words used by Ward could justify Butler in striking him. Yet, if Ward used these words for the purpose of inducing an attack, he is not justified in shooting. The attack does not even reduce the crime from murder to manslaughter.

Mr. Crittenden has told you that the object of trial by jury is a merciful one; that the Judge understanding the law and bound by it, might condemn, where the jury, actuated by the impulses of warm and generous hearts, might acquit. But you are sworn to decide by the law and the evidence. I would say to you, that your hearts are not to try this case, but your judgment. Pluck out your hearts if possible, and change yourselves into pillars of stone. In what part of your oath did you

these words, cannot rely on the illegality of the blow, to screen his subsequent conduct. To support this, let us examine the law.

[*Mr. Allen* read authorities to show that the act, as shown by the evidence, was not excusable homicide. He quoted from Wharton, Roscoe and Archbold, and from these concluded that no man has a right to slay for a trespass to property, or a mere assault on his person. There must be an apparent design to take life or do enormous bodily harm. He then read from the same authorities to show that the act was murder, not manslaughter. In reading these authorities, he commented on them, and showed they reduced the killing from murder to manslaughter, only when done in sudden passion, or great provocation, and then continued.]

What is the provocation in this case? Bob says, "Butler had pushed Matt. back to the wall." Admit this, and the killing is not then justifiable, as he brought on the attack. There was no necessity to kill Butler to save life or limb. He must have retreated as far as he could, and been without fault himself. He had no cause to believe that he was in great danger of bodily harm, and if he did believe so, there was no good ground for the belief. Ward knew Butler would not hurt him; that he was a man of peace. Besides, Bob was there, armed, to protect him. There were no menaces against his life; there was no danger of bodily harm, and he was not without fault himself. The presumption of the law is, it was done with malice, and this presumption is strengthened by the purchase of the pistols, his excited manner in going to the school, and his manner while there.

Thus far I have examined the case as presented by the evidence for the defense. But I cannot consent that it shall be thus tried. With so many good witnesses of our own, I insist on their testimony being received.

No one doubts a single portion of the testimony of the boys. They are not contradicted. Allen and Gudgel do not contradict them. Allen only testifies that Worthington nodded assent to something, he cannot tell what. All that can be made

of it is, that Worthington does not remember any such conversation. Gudgeon thought he recognized Benedict as the boy he met in the alley, but it has been shown he was mistaken. The boys are fully confirmed, and their testimony shows the excited manner of Ward, his insulting remarks; it shows that he was not struck until he struck; that he was not pushed back, but just leaned back, and that there was no necessity for him to kill Butler, to save life or limb, or prevent any bodily harm. Their testimony is confirmed by Thomson, and as for Barlow, let him rest in peace; I am no turkey-buzzard, and shall not disturb his carcass. He killed himself by his own testimony, and though the defense have applied a strong galvanic battery to his remains, they have produced but a few awkward contortions, bearing no resemblance to those of life. He is past resurrection—let him alone.

Now let us suppose the facts were just as they have been proved up to the time of shooting, and at that identical moment that Butler had killed Ward, instead of Ward killing Butler, and that Butler was now on trial for the act. We have shown Ward's intention to make the call, his purchase of the pistols, his excited manner, his insisting on going instead of his father, his manner in the school room, his insulting questions, his calling Butler a d—d scoundrel, his drawing a pistol, and just then suppose Butler shot him, and was now on trial before you. You would be bound by the law and the evidence to acquit Butler. There cannot be two justifications for the same deed, and if you would acquit Butler, you must convict Ward.

And now, gentlemen of the jury, I must close. I have argued the case fairly, and so have my associates. We have made no fierce accusations against the prisoner, nor against any of the witnesses, not warranted by the facts. You must discard all appeals to your feelings. I have made no appeals. You have looked on that monument of grief, the widow of the deceased, and have seen the great effort she made to control her grief. I have imitated her example. I have presented the case as it is. You must try it by the law and the evidence, and



decide whether the prisoner is guilty of murder, or whether he is guilty of manslaughter, or whether he is innocent. Cast away all excitement, and administer the law under your oath.

Your merciful feelings have been appealed to. What claims has the prisoner on you for mercy? He is surrounded by friends, rich and influential. He has had the benefit of all the counsel and all the witnesses he wished. I have seen a case where a jury might administer mercy. A poor Dutch boy, ragged, cold, freezing, stole a coat to preserve life; was arrested; a stranger in a strange country and the language, without friends or relatives, dependent on the Court for his counsel, he presented a case for a merciful construction of the facts. The case before you is entirely different. The prisoner has powerful friends, and has brought a host of witnesses. The mercy he showed to others is his only claim for mercy.

#### THE CHARGE OF THE COURT.

JUDGE KINCHELOE. Gentlemen of the Jury: The cause to which you have with commendable patience given your attention for nine days past is at length submitted to you for your decision. But before you retire to your room, I conceive it to be my duty to direct your attention to the issues made in the progress of the trial, and to caution you against permitting certain matters which have been casually alluded to in the argument of counsel to influence in any degree your verdict in the cause. You are constitutional judges of the fact. The usual course of practice in criminal cases in this district—that of reading and discussing the law before the jury by the counsel—having been adopted in this case, will relieve the Court of the necessity, and to some extent renders it improper, to enter into a discussion of the various principles of law applicable either directly or indirectly to the facts proved in the case.

The killing not being controverted, it will be your duty to determine whether it was perpetrated under such circumstances, with such malice as to constitute the offense murder. Malice, expressed or implied, is an essential ingredient of this

crime; there can be no murder without it. Malice has been defined and explained to you, and numerous cases have been read where a certain state of facts have been determined by courts of justice to indicate that acts were malicious or otherwise. These judicial decisions are properly to be regarded as illustrations of the legal idea of malice. In some of them the distinction between the two classes of cases is almost imperceptible; and in understanding those cases properly you will have to bear in mind the definition of malice so as to make a just application of the principles of the law to the present case. If you find the killing to have been done maliciously, as charged in the indictment, you will return the verdict, Guilty. Although you may believe from the evidence, that the killing was not done maliciously, yet under the indictment in this case you may find the prisoner guilty of manslaughter, if the facts proved in the case shall in your opinion justify such a verdict. The distinction between murder and manslaughter has been explained to you at large. The grand distinction is: in murder the act is prompted by malice; in manslaughter it is perpetrated in sudden heat of passion, without malice. If from the evidence you believe the killing in this case was done—not in self-defense—but in sudden heat of passion, without malice, the crime is manslaughter; and in such case you will have to determine the length of time the prisoner shall be confined in the jail and penitentiary of this State—a period, not less than two, nor more than ten years. If you believe from the evidence that the act was done in self-defense, the law excuses it, and it will be your duty to find the prisoner at the bar Not Guilty—and you will return your verdict accordingly.

Thus three distinct propositions are submitted for your consideration, viz.: whether the act was done maliciously—and therefore a murder; whether in sudden heat of passion, without malice, which constitutes manslaughter; or whether in self-defense, which the law excuses; and to the proper solution of these questions I urge upon you in your retirement a calm, patient and impartial investigation of the facts proven in the case. If upon such investigation you have reasonable—not

fanciful or imaginary—doubts whether the act was murder or manslaughter or in self-defense, it will be your duty to acquit the prisoner. Some facts, not before you as proof, have been occasionally alluded to by counsel on either side—such as the supposed causes of a change of venue—newspaper publications on the subject of the prosecution, etc.—but these should not, and I presume will not, have the slightest influence on your minds. You will now, gentlemen, retire to your room, and under the sanction of the oath you have taken, calmly and impartially consult and deliberate together—and return your verdict according to law and the testimony in the case.

The *Jury* retired to make up their verdict on the eighth day of the trial at about 5 p. m.

#### THE VERDICT.

*April 27.*

At about 9 o'clock word was received from the jury, stating that they had found a verdict. The prisoner was immediately brought in, and after he had reached the court room, the jury, under the charge of the sheriff, came from their room and were conducted to their seats. By this time intelligence that they had come to a decision had spread so rapidly that the court room was densely crowded with people, and the oppressive silence that prevailed, indicated the deep interest that was felt.

The COURT. Gentlemen of the jury, have you agreed upon a verdict? The *Jury*. We have.

The COURT. What say you, gentlemen, do you find the prisoner, Matt. F. Ward, guilty or not guilty of murder, as charged in the indictment? The *Jury*. *Not Guilty*.

The COURT. Do you find him guilty of manslaughter, as charged? The *Jury*. *Not Guilty*.\*

\* They afterwards stated that when they entered their room, to make up their verdict, eleven were in favor of acquittal. The twelfth was in doubt, caused by what he understood to be a portion of the testimony of Quigley. When he was convinced, however, that his memory had been imperfect or erroneous on that point, he coincided with his associates.

This announcement was followed by an outburst of applause from the spectators outside the bar; but the demonstration was promptly checked by the Court.

The *Prisoner* was borne from the room by his friends in a fainting condition; the verdict was recorded by the *Clerk*, and the *Jury* were discharged.

The *Commonwealth Attorney* entered a *nolle prosequi* in the case of Robert J. Ward, Jr., and he was immediately discharged from custody.<sup>1</sup>

<sup>1</sup> The Cole report of the trial contains the following addendum:

The news of this verdict was received in the city of Louisville, as it has since been throughout the State of Kentucky, and over the entire Union, with the greatest indignation. In Louisville, especially, where it was published on the morning of Friday, April twenty-eighth, the excitement immediately produced was intense. But little business was done on that day or the next. All men seemed to think that an indelible stain had been fixed upon the fair fame of the state, by the mockery of a trial that had been had, and the iniquitous verdict that had been rendered; and the oldest, most substantial, and most respected citizens, demanded a public meeting, that the city of Louisville might cleanse itself of the disgrace that would otherwise rest upon it. In the newspapers of Saturday morning, appeared the following:

*Notice*—A meeting of the citizens of Louisville, favorable to the erection of a monument to the memory of the late lamented *Professor Butler*, is requested at the Court House, on Saturday evening, April twenty-ninth, at early gas light.

Pursuant to this call, the largest and most respectable assemblage that has ever convened in the city, gathered within and around the court house at an early hour in the evening. The number present has been variously estimated at from eight to twelve thousand. The west room in the second story of the building was filled at a very early hour. Several old, universally known, and generally esteemed citizens had been requested to act as officers, but the press was so great that the principal of them could not effect an entrance to join those who were earlier in their attendance. Some delay in effecting the organization was thus induced, and during its continuance, Sherrod Williams, on request, addressed the meeting. Mr. W. fully recognized the justice of the indignant feeling that had moved, as it were, a whole community, and expressed his own deep sympathy with it, but deprecated violence against person or property, and besought people to content themselves with a warm and decided expression of their sentiments with reference to the crime that had been committed, and the mockery

of a trial that had been had of its guilty perpetrator. Mr. Williams was listened to with the most respectful attention; but the crowd outside, which was continually augmented by fresh arrivals, became impatient to know what was going on within. It was therefore agreed to go below; but when most of those who were up stairs had got down, any thing like a satisfactory organization there was found to be impossible. It was therefore proclaimed that the regular meeting would organize above, and that resolutions should be reported and passed, they would be sent down for ratification. On returning to the large room above, Gen. Thomas Strange was chosen President, and Mr. George Anderson, Secretary. Gen. S. made a brief but appropriate and forcible address on taking the chair, at the close of which, on motion, John H. Harney, Theodore S. Bell, Bland Ballard, W. D. Gallagher, W. T. Haggin, Edgar Needham, and A. G. Munn, were appointed a committee to draft resolutions. While this committee was absent, the Rev. J. H. Haywood was requested to address the meeting, which he did with his accustomed beauty and effectiveness. Upon the return of the committee, Bland Ballard read the subjoined resolutions, which were received with the most decided approbation, and carried by a unanimous vote of the assemblage:

"The citizens of Louisville assembled in public meeting for the purpose of giving expression to their opinions respecting the trial and the verdict of the jury in the case of the Commonwealth vs. Matt. F. Ward, recently tried in the Hardin County Circuit Court, do submit to the public at large, but more especially to the citizens of the Commonwealth of Kentucky, the following resolutions as expressive of their views of the matters herein referred to:

"1. Resolved, That the verdict of the jury, recently rendered in the Hardin County Circuit Court, by which Matt. F. Ward was declared innocent of any crime in the killing of William H. G. Butler, is in opposition to all the evidence in the case, contrary to our ideas of public justice, and subversive of the fundamental principles of personal security, guaranteed to us by the Constitution of the State.

"2. Resolved, That the criminal laws of this Commonwealth should be so administered that every citizen may feel secure from insult, injury, and violence, both in person and in occupation; and that the omnipotent power of public opinion should at once be so directed as to discountenance and condemn all attempts to thwart the ends of public justice, and to cause the practical realization that man-slaying is in fact the highest crime known to society.

"3. Resolved, That the published evidence given on the trial of Matt. F. Ward, shows, beyond all question, that a most estimable citizen, and a most amiable, moral and peaceable man, has been wantonly and cruelly killed, while in the performance of his regular and responsible duties as a teacher of youth; and notwithstanding the verdict of a corrupt and venal jury, the deliberate judgment

of the heart and conscience of this community pronounces that killing to be murder.

"4. Resolved, That the charge of vindictiveness and cruelty preferred against the citizens of Louisville, by a portion of the counsel for the defence of Ward, is a vile and unmerited slander; and we proclaim that each and every imputation cast upon our esteemed fellow citizen, Dr. D. D. Thomson, and our neighbors' children, the pupils in Prof. Butler's school is utterly groundless and unjustifiable.

"5. Resolved, That the public press of this Commonwealth should be so conducted as to be recognized as the conservator of the public morals, and that a failure of any portion of the press to rebuke and condemn an atrocious crime against society, tends to debauch the public virtue and to destroy the public morals.

"6. Resolved, That in the death of Wm. H. G. Butler, his family have lost a most devoted, affectionate, faithful son, brother, husband and father—the cause of education, a most accomplished friend and advocate, one whose talents and acquirements placed him in the front of his useful and honorable profession—and that society has lost one of its purest and best members, whose life is unspotted by a single blemish—as gentle and noble a spirit as ever breathed.

"7. Resolved, That in token of our respect and affection for, and as an evidence of our appreciation of W. H. G. Butler, we will at once take measures for erecting a monument to his memory, and to present to his widow a substantial token of our regard for her.

"8. Resolved, That we regret and condemn every manifestation of disorder, and we exhort all good citizens, by their reverence for law, by their own self-respect, and by their love of the virtues of him whose loss we deplore, to abstain from violence to persons or property, and from every disregard of law and order—remembering that society cannot exist without order, and that he whom we revered when on earth, was incapable of mediating harm to any one, and that every wrong committed will wound his pure and lovely spirit."

As soon as the resolutions were passed, the committee retired with them to the crowd below, where they were read by Sherrod Williams, and carried with equal unanimity. After the committee left the meeting above, resolutions were moved and carried, requesting the two Wards to leave the city, inviting Nat. Wolfe to resign his seat in the State Senate and follow them, and requesting John J. Crittenden to resign his place in the Senate of the United States, to which he was elected by the Legislature of Kentucky last winter.

By a portion of the immense crowd outside, another meeting was organized by which another series of resolutions was passed, equally condemnatory in their tone with those passed by the regular meeting in the Court House, as to the trial and the verdict, and much more sweeping in their references to individuals who had rendered themselves obnoxious in different ways, by their connection with

the trial, several of whom were singled out by name, for public censure.

By a large number of persons in the Court House yard, after the regular meeting in the west room had adjourned, effigies were hung up and burned, of Matt. F. Ward, Barlow (the false witness), the members of the Hardin county jury, and a number of other persons, who, by their acts, had subjected themselves to the deep displeasure of the people of Louisville.

Earlier in the evening a crowd of men and boys gathered in front and at one side of the private residence of Robert J. Ward, doing considerable damage to the conservatory with stones, and with the same missiles breaking some of the front windows. While this was going on, effigies of Matt. and young Robert Ward, were strung up in front of the door. These were afterwards set on fire, when some person unknown, caught one of them up and threw it against the front door, which was thus set on fire. The alarm was at once given; several engines were soon upon the spot, and after encountering a somewhat decided but by no means stubborn opposition from the men and boys near the house, the flames were extinguished.

As the closing sheets of this Report go to press, a week has passed since these occurrences took place. No one pretends to defend or excuse the lawless depredations committed upon the private residence of Robert J. Ward; every good man condemns them as wrong, uncalled for, and reprehensible; but the heart of the whole city beats with one pulse, and nobly responds to the manly, decided and conservative tone of the series of resolutions embodied in this closing narrative, as passed by the meeting of citizens held in the Court House.

## THE TRIAL OF ARCHIBALD McARDLE FOR ASSAULT AND BATTERY, NEW YORK CITY, 1822.

### THE NARRATIVE.

Peter Crawbeck was walking along the Bowery in New York City in the fall of 1822, when he heard the screams of women in an adjoining store. Like a chevalier of old, Peter rushed to the scene and entering the store he found it was a real case of imprisonment. Two young women were being held by the storekeeper and admonished that they could not leave until they had given him good money for a counterfeit five dollar bill, which he said they had passed on him that very morning. Both the women denied the charge and were in tears and their condition so excited the sympathy of Peter that he told the storekeeper to let them go. A quarrel ensued, which ended in the storekeeper seizing Peter by the throat and otherwise treating him roughly. For this Peter haled the merchant into court on a charge of assault and battery, and he was promptly convicted and fined, the Court ruling that the merchant had no right to detain the women and Peter had a right to try his best to release them.

### THE TRIAL.<sup>1</sup>

*In the Court of Quarter Sessions, New York City, December, 1822.*

HON. RICHARD RIKER,<sup>2</sup> *Recorder.*

JACOB B. TAYLOR, }  
HENRY MEAD, } *Aldermen.*

*December 18.*

Archibald McArdle, who was charged with committing a

<sup>1</sup> Wheeler's Criminal Cases, 1 Am. St. Tr. 108.

<sup>2</sup> See 1 Am. St. Tr. 363.



violent assault and battery upon one Peter Crawbeck on September 5 last, was put on trial. He pleaded *Not Guilty*.

*Mr. Maxwell*,<sup>3</sup> for the People.

*Mr. Sampson*<sup>4</sup> and *Mr. D. Graham*, for the Prisoner.

#### THE EVIDENCE.

*Peter Crawbeck*. Am the prosecutor in the case; on the afternoon of September fifth last my attention was attracted by a crowd before McArdle's store in the Bowery. I asked what it was and was told that McArdle had violently taken two women into his store. I went in and found him in a discussion with two women whom I afterwards learned were Mrs. Clark and her sister Miss Jemima Johnson. The women were crying and called upon me for help. Prisoner said that they should not leave until they had paid him good money for the counterfeit \$5 note he said they had passed on him. He said that in the morning they had been in the store, bought some goods, and given him a \$5 note in payment, that he afterward discovered to be bad. He saw them passing a few minutes after, went out on the sidewalk and brought them in. They both denied his story. I believed them and expostulated with the prisoner and demanded that he let them leave the store. He said he would not until they paid. We had more words which ended in the prisoner taking me by the throat and trying to

strangle me. I broke loose and went out and had him arrested.

*Miss Johnson* and *Mrs. Clark* testified that the prisoner was mistaken; they had not been in his store that day. He dragged them into the store and kept them more than an hour against their will.

*Mr. Petrie*. Miss Johnson came into my store in the Bowery, to purchase a ball of cotton, and offered me a \$5 counterfeit note in payment; she had on a straw bonnet and white spencer; am certain I could not be mistaken.

*Mr. Miller*. Am a store keeper in the Bowery; Miss Johnson came into my store and offered me the same note that was afterwards received by defendant; am certain she is the same woman, and am certain it was the same note.

A number of respectable witnesses testified that Miss Johnson was lately from Middletown, Connecticut, and was entirely unacquainted with the city; that she had no such dress as described by Petrie and Miller; also that she was a young woman of good character, and that the witnesses must have been mistaken in the identity of Miss Johnson.

The COURT (to the jury). Any person has a right to arrest a felon, and bring them before the proper authority. It is in-

<sup>3</sup> *Id.* 62.

<sup>4</sup> *Id.* 63.

deed the duty of the citizen to do so. But then this power cannot be trifled with, as it appears to have been in the present case. The defendant seized Miss Johnson in company with her sister, Mrs. Clark, by the arm, in the street, charging her with passing a counterfeit bill upon him. He took them into his store, and there confined them for the space of nearly an hour; telling Miss Johnson if she would pay him in good money the amount he alleged he received from her, he would let her go; if not, he would send for an officer and take her to the police office. This mode of proceeding was clearly irregular. It was the duty of the defendant, if he believed the woman guilty, to take her immediately to the proper authority; or if that could not be done, to secure her in his own house or some other place until he could send for an officer, or take her himself. But in this case it does not appear that the public good was his object, but, on the contrary, private interest. He offered to let her go if she would pay him five dollars for the bad bill. Now, it is certain he had no right to force her into his house and detain her there for the purpose of receiving five dollars for any consideration.

The *Jury* returned a verdict of GUILTY, and the *Prisoner* was remanded for sentence.

## THE TRIAL OF JOHN HANLON FOR THE MURDER OF MARY MOHRMAN, PHILADELPHIA, PENNSYLVANIA, 1870.

### THE NARRATIVE.

In September, 1868, there lived in Philadelphia, on Fifth street near the corner of Diamond street, a young, newly married man, named John Hanlon. By trade he was a barber, but not a very skillful one, as he had acquired his whole knowledge of his art while a soldier, in a camp at Alexandria. The house where Hanlon lived was an unpretending, three-story brick—one of a number of the same kind of houses in that block. His mother and sister occupied the upper portion of the house, while Hanlon (who had but lately married a girl of beauty and pleasing manners, he being, at that time, twenty-two, while she was scarcely seventeen,) kept the first and second floors for his own use. On the first floor was his barber shop, approached from the street by a flight of three stone steps, and its door was ornamented on either side by two short poles, painted in red, white and blue stripes, and ornamented at the top with a golden acorn. In a little street immediately behind Hanlon's shop there lived a widow named Mohrman and her five children, the youngest only a little over six years of age, being known among the neighbors as "little Mary Mohrman"—a term of endearment and affection, for they all loved the little girl.

One Sunday evening in September there were seated on Mrs. Mohrman's steps a number of young girls, among them little Mary. The mother left the house for the evening church service, and Mary a little while later, accompanied by one of her young companions,<sup>1</sup> went down the street,

<sup>1</sup> Caroline Dinglacker, p. 310.

and just at the barber's pole a man asked them where a certain street was; Mary told him, but her companion ran away as she saw the man take her by the hand and lead her into the alley. When Mrs. Mohrman returned from church she could not find Mary, and the children said they had not seen her since she went around the corner with the strange man. The alarm was given; the bell-man proclaimed the loss in the streets and the city police and detectives were soon making search. No trace of the child was found until two days later, when the body was discovered in a vacant lot some distance from the houses of Hanlon and Mrs. Mohrman. The child had been dead for at least two days, the physicians testified; the underclothing was stained with blood; there were bruises on her arms and wrists and neck, and an autopsy revealed the cause of death to be strangulation and that her person had been grossly violated. The activity of the authorities bore no fruit for some time, and though several men were arrested on suspicion (among them John Hanlon), all of them were discharged for lack of evidence, and the crime bade fair to remain undiscovered and unpunished when, more than a year later, the key to the tragedy was discovered through the act of the perpetrator himself.

In November, 1869, a man calling himself Charles C. Harris was tried and convicted in Philadelphia and sentenced to four years' imprisonment for an assault on a young girl. Taken to the Moyamensing Prison, he was discovered to be John Hanlon, the barber, and at the suggestion of the detectives, another convict named Dunn, was put in the same cell with him, to find out, if possible, if he were the murderer of little Mary Mohrman. The ruse was successful. Within a few weeks he had told the whole story to his cell-mate and had confessed that he was her murderer. He was taken back to Philadelphia and put on trial for the murder. The story told by Dunn was the powerful evidence against him, but it was substantiated in all its material points by a number of other witnesses and he was convicted and hanged.

THE TRIAL<sup>2</sup>

*In the Court of Oyer and Terminer, Philadelphia, October, 1870.*

HON. JAMES R. LUDLOW,<sup>3</sup> }  
HON. WILLIAM S. PIERCE,<sup>4</sup> } *Judges.*

*October 31.*

John Hanlon, having been indicted for the murder of Mary Mohrman, a girl of only seven years, the trial came on to-day.

District Attorney *Sheppard*<sup>5</sup> and *H. S. Hagert*<sup>6</sup> for the State.

<sup>2</sup> *Bibliography.*—\* “Life, Trial, Confession and Conviction of John Hanlon for the Murder of Little Mary Mohrman, containing Judge Ludlow’s Charge to the Jury, and the Speeches of the Learned Counsel on both sides. ‘Man or beast, by looking in his face, ye could not judge, his actions speak the more!—Shakespeare.’ Philadelphia: Published by Barclay & Co., No. 21 North Seventh street, 1870.” On the cover Hanlon is shown standing on the scaffold, a rope around his neck; behind him is the Sheriff whose face is hidden by his hat, and in front of him a priest holding a crucifix. On page 41 is a full length portrait of the condemned man. On page 47 he is shown dressed in convict’s garb being visited by his wife in prison, which is repeated on the back of the cover. On page 54 is a picture of Caroline Laudman discovering the body of his victim. On page 63 a picture of Hanlon’s house and barber shop. On page 71 a picture of the murderer carrying the dead body of the little girl. On page 79 the mother’s recognition of her murdered child. On page 87 Hanlon’s attack on Miss Ritchie. On page 95 a sketch of a court room and a woman giving evidence. On page 102 a sketch of a man stabbing another, a woman in the background. On page 111 a sketch of a duel.

<sup>3</sup> LUDLOW, James Reilly. (1825-1886.) Born in Albany, N. Y. Judge of the Philadelphia Court of Common Pleas 1857-1875. President of that Court 1875-1886.

<sup>4</sup> PIERCE, William S. (1815-1887.) Born in Newcastle, Delaware. Admitted to Bar of Philadelphia, 1845. In 1866 was appointed Judge of the Court of Common Pleas of Philadelphia and continued to hold his seat on the bench by election until his death.

<sup>5</sup> SHEPPARD, Furman. (1823-1893.) Born in Bridgeton, N. J. Graduated, Princeton, 1845. Admitted to Philadelphia Bar 1848. Elected District Attorney 1868. Trustee Jefferson Medical College. Member Historical Society of Pennsylvania and American Philosophical Society; author of several books on Constitutional and Public Law.

<sup>6</sup> HAGERT, Henry Schell. (1826-1885.) Born in Philadelphia, and a leader of the Bar of that City. Published a volume of poems.

*B. H. Brewster,*<sup>†</sup> *John P. O'Neill* and *P. F. Carroll* for the Prisoner.

Considerable time was consumed in empanelling a jury, a good many of those summoned having either formed or expressed an opinion, or having conscientious scruples in respect to the death punishment. The jurymen finally selected to try the case were: T. C. Christman, Foreman; Hart Judah, John Collins, H. J. Vantyle, C. P. B. Jeffries, James F. Bradfield, Thomas Craigmil, Joseph Winpenny, John Little, Thomas J. Lippincott, Jeremiah Riley, and George Turner.

#### THE CASE FOR THE STATE.

*Mr. Hagert* (to the jury). The child, Mary Mohrman, who was killed, was but six or seven years old; she lived with a widowed mother; was enticed into an alley by the defendant; was barbarously outraged by him; she was strangled and her body concealed in his cellar for a time, and afterwards thrown into a pond at Fifth and Dauphin streets. The defendant was arrested on the charge, but there was not sufficient evidence then to hold him to answer. He was afterwards arrested on a similar charge, and while imprisoned in the same cell with Michael Dunn, the prisoners became confidants, and the defendant told his companion that he had perpetrated this offense. This led to investigations, which clearly proved the guilt of the defendant. The details would be given by the witnesses.

<i>Dr. Shapleigh.</i> Am a physician. Made an examination after death of the body of Mary Mohrman. Found the child rather large for her age; there was mud and sand upon her garments, and upon her hands, legs and	feet; her feet were bare; there were wounds upon her head; lacerated, about half an inch long and an inch apart; there was another wound, about an inch long, parallel with the other, of similar character, and another at right
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<sup>†</sup> BREWSTER, Benjamin Harris. (1816-1888.) Born in Salem County, New Jersey. Graduated, Princeton, 1836. Called to the Bar 1838. Attorney-General of Pennsylvania 1867. Attorney-General of the United States 1881.

angles with it, about half an inch long; they had been caused by a blunt instrument; one without a sharp or cutting edge, as by a stone, stick or club; they might have been caused by blows or a fall; there were slight bruises on the wrists and ankles, and also wounds, with scratches, on the chest and neck; the most severe bruises were under the ears and down the neck; these bruises and scratches might have been caused by the hands; her person was torn and lacerated externally; the stomach, bowels and liver were in a healthy condition; her person was greatly ruptured; the underclothing was bloody and stained with mud; the face was of a dark color and swollen, indicating strangulation; the same cause produced the appearance of the blood on the brain; the cause of death was strangulation; she had been dead at least twenty-four hours; putrefaction had not set in; think she had been dead from one to three days.

*Mrs. Mohrman.* Am a widow; have four children yet; am the mother of Mary Mohrman; she was six years, three months old; I lived then in Orkney street, below Diamond; John Hanlon lived in the first house on Fifth street, below Diamond, lower side, nearest the Delaware; he was a barber; I saw my little girl, Mary, the last time about a quarter past seven on Sunday evening, September 6, 1868; I went out and she left me at the corner of Orkney and Diamond streets when I went on to church; came home about half-past eight or twenty minutes of nine; asked if my children were all here; my little girl, Annie, told me, "No,

mommy, Mary is not here, and I can't find her;" went to hunt her around Fifth street; asked the neighbors if she was around; they said she was there about ten or twenty minutes ago; went about with a bell about two squares up and down; went to the station-house; came home about one o'clock; she was not there; made no more search that night; about six o'clock next morning went to the station-house, but could not hear if she was here or there; neighbors and police officers helped me to search; at twelve o'clock I went to the Mayor's office; he sent me to another gentleman who told me I should have patience until ten o'clock next morning; the lieutenant was to meet him then, and he would give him instructions; went to Fifth street and Susquehanna avenue, on the very lot on which Mary was found; she was not there then; it was in the afternoon; don't know that I was at the pond, but I was all around the weeds; then went home; on Tuesday morning about six I first heard that her body was found; Mrs. Hoby first told me; Mr. Kessler, Mr. Cress, Mr. Recht, and all the neighbors helped me in the search, with a little boy, who went with my boy to the station-house; Mr. Hanlon did not assist in the search. When I last saw Mary she was in the best health; had on a pair of drawers, chemise, little hoops, white petticoat, and light dress with pink stripes; no hat or shoes (dresses shown); that is her dress. In my search I passed Hanlon's home about twenty minutes or a quarter to ten.

*Caroline Dinglacker.* Lived at

northwest corner of Fifth and Diamond streets when Mary was missed; was with her that evening at Mrs. Mohrman's steps when Mary was there; I had a coach with Mrs. Busch's baby in it; we went away together pulling the coach; we went down Fifth street; we stopped by Hanlon's barber pole; the man had his foot on Hanlon's step; he asked me if I would tell him where Fifth and Dauphin streets was; I said no; he asked Mary, and she said yes; he took Mary by the hand, and took her in the alley; I called her several times, and she would not look back; I took the coach to Bush's and looked back several times, but did not see her come out; I took the baby home, and ran right across the street from Bush's; went toward our house; looked over at Hanlon's; the barber shop door was standing wide open, but I could not see in it; it was dark; could not see up the alley; there was nobody in it; stopped and looked up; was afraid to go on that side; when I got to our house went in, pulled off my shoes and stockings and went to bed; then looked out of the window, and saw a man go up the alley,—Mr. Hanlon's alley; the man had on a straw hat, a black one; did not know him; he had dark clothes on; he had a striped shirt on.

*Mr. Hagert.* Which man?

*Mr. Brewster* objected, as this was practically leading and directing the witness.

*Mr. Hagert* said he did not intend to lead, and he agreed that he was only entitled to ask "which man?" which the counsel for the defendant admitted

to be right and proper. The witness has spoken of two men, and I want to know which she is describing.

The COURT admitted the question but suggested that disputed questions should be reduced to writing and submitted to the COURT.

*Caroline Dinglacker.* I mean the man who asked me to go to Fifth and Dauphin streets had the dark suit and striped shirt on; the man I saw go up the alley had the dark straw hat on; the man that I saw when I looked out of the window had the dark straw hat on; the man that spoke to me had a cap on, and had whiskers, too; did not see Mary after she got up the alley; did not look there; did not know the man who spoke to me; did not see Mary again that evening; went to bed after looking out of the window.

The witness was cross-examined at great length by the *Counsel for Defense*.

A number of other witnesses testified to seeing a man sitting on Hanlon's step on the evening of the child's disappearance, but they did not know who the man was; as to the time when they last saw the child with the man and as to the time of the discovery of the body. They were: Samuel Belger, Emma Bush, Martha Conathy, George Custer, Officer Fluck, J. N. Giberson, Anna Lepp, George J. Linck, Caroline Laudman, Isabella Martin, Anna Mohrman, Mr. Perkins and Alfred Walton.

*November 3.*

*Michael Dunn.* Am a pardoned convict and the prisoner, who was also confined there, made a



confession to me at that time. Before I was convicted and imprisoned in Moyamensing I did not know prisoner; knew nothing about him, nor heard of him, until he came into my cell; never knew of Mary Mohrman's death till he told me; whenever I came into the city always lived at No. 233 Front street; was in the city about five times and lived there before conviction; by the depot of the Camden and Amboy railroad; on Front street, at a tavern; these three times were at the end of 1867, and beginning of 1868; was there, at Russel's, in October or November, 1867, and then about the end of December, 1868, or beginning of January, 1869; also in February following; lived in New York when at home; had lived there four months; lived there before that, in Sing Sing prison; served my time out; had been convicted of going into houses to commit robberies in the day time; came from Liverpool; was born in Manchester, but lived in Liverpool; was sent to sea by the British Government; to Australia—want to tell the truth; had a year's mitigation of my sentence; had no property; lived by stealing; came here to steal, and did steal; was sentenced in England to five years for stealing rings from jewelry stores; was arrested here in July, 1868, tried in August; pleaded guilty, and was sentenced; did not know Hanlon was coming into my cell until he came; Mr. Daniel, one of the keepers, brought him; was the twenty-ninth of December, on a Wednesday; had an almanac, but made no mark on it; he was there every day, except on Sundays, until the first of March; Mr.

Smith and Mr. Tryon came into my cell over a trunk of clothes that had been stolen from me; they told me they were detectives and had been looking for my trunk; Mr. Smith said: "Mike, what would you think of a man who would commit an outrage on a girl, and afterwards murder her?" He looked at my work and said I was making a good shoe; asked me how I would like to have a partner in my cell; I said yes; no one besides Smith had been there before except prison keepers bringing food or work or a razor to shave; they had no conversations with me; was not told Smith and Tryon or any one was coming to see me; Mr. Tryon said the body of the girl was found on a dunghill; that's all he said; they were with me ten or twelve minutes; nobody came to my cell after that till Hanlon came two days after, except the keepers; I never saw Hanlon before that day; did not tell him of the interview I had with Smith and Tryon; nor what Smith said about the girl; my wife is in New York, in Sing Sing, for five years; was not told to speak out candidly in court; was at work when sent for this morning; did not know before that I was wanted; Smith, Taggart and Tryon all saw me in prison; they said I might be wanted. I said any man that would do that ought to be hung; he then asked if I would like to have a partner; told him my head keeper had promised me one at the beginning of the year; Smith did not say I should have as a partner the man that was accused of the murder of the girl; no one but Hanlon was in my cell until he was brought in,

except the keepers; the keepers did not speak to me on this subject; saw Smith the Sunday week after that; about two or three o'clock in the afternoon; I was brought down into the office of the prison; Mr. Fleming, my keeper, brought me down; he said nothing to me: I told him I wanted to see Mr. Smith; was not told to get a confession from Hanlon by the detectives, nor did they arrange with me to get a confession from him.

*The Counsel for the Prisoner* objected to the witness being allowed to testify to the confession, but the objection was overruled by the COURT.

*Michael Dunn.* Have been living since August 15, 1868, in Moyamensing prison; did not know the defendant Hanlon before he came into my cell, twenty-ninth of December, 1869; he remained there till the first of March; had conversation with him during that interval; the first time he spoke to me of the killing of Mary Mohrman was on the Saturday after he came in; he told me he had been charged with the murder of Mary Mohrman; I asked how old she was; he said between twelve and thirteen years; the next conversation was on the following Thursday; he told me he was the man that did it; he told me that "on the Sunday the murder was done, I did not dress myself up that day; at three o'clock in the afternoon I crossed over to the lager beer saloon, Fisher's; I left there at half past seven o'clock, crossed over to my own house and sat on the steps; in a few minutes I got up and went to the corner of Fifth and Diamond streets; I asked Emma Welsh first to show

me the way to Fourth and Dauphin streets; she was playing with Mary Mohrman and another little girl, by the side of a cigar post; but she knew me; she said, 'You know where Fourth and Dauphin streets is as well as I do;' I then went into my own house, and fixed myself so that my own mother would not know me; then went out the back way into my alley; it runs between my house and the cigar store; stood there till I got a chance to get Mary Mohrman into the alley; a party seen me standing there, but did not know me, as I had whiskers on; got her in the alley; at this time Emma Bush was not there, but the other girl was there, and she seen me seize Mary Mohrman; the next day she said it was a man with whiskers on; that is why I stood my ground; in a minute or two after I got her in the alley, a man came through the alley; at this time I had her standing up against the fence that separates the yard belonging to the cigar store from the alley; I did my best not to let the man see her; he hit up against me in passing; did not know this man, and am d—d sure he could not swear to me; the man went on through the alley somewhere; I opened the gate leading into my own back yard, and took her into my privy; I caught hold of her by the neck; the more I hurt her the more she tried to holler, and the more tight I held her; when I was done she was dead; every one thought she had been cut with a knife; I did not cut her; carried her across the yard to a small window that led into my cellar; the lid goes up and down; it has no latch to it; I put the

body through the window, and put down the window again; took off the whiskers and went up stairs; it was half past eight o'clock when I had her in the privy; she was about nine years of age; she had auburn hair and blue eyes;" he told me three different ages at different times; he said, "I had hardly got up stairs before Mary Mohrman's mother came to look for her in front of my house; my mother went down stairs to Mary Mohrman's mother, and they both went to find her; I also went, but did not go far; I turned back; I went into my own house into the cellar to see if she was quite dead; she was dead enough; I covered her up and left her in the cellar; the cellar was never used for anything, hardly; there was only some rubbish in it; I was pretty full of lager beer, but I knew enough to try and get the body anywhere away from my house, if I saw half a chance; went into the house and opened one of the shop windows a little, and peeped through the shutters to see if the coast was clear; some one or another was going about all night till it got too light toward morning for me to take her away; so I still left her in the cellar, and cleaned myself up as if nothing had happened; did not go to bed, although I felt sleepy; at breakfast time I ate a little; cleaned myself and went down town; had any one found the body they would not have found me; went home again and had a little dinner; was bound to get her away that night—Monday night; tried three or four times before half past two o'clock; seen the coast was not clear until between three and

four o'clock; got the body and went out my back way; turned to my left, crossed over to Diamond street, then turned again up Diamond as far as Sixth, and turned up Sixth; went into Dauphin and then turned again; saw a man on the opposite side; got behind a cart; don't think he saw me; then threw the body down on a spare lot; crossed over to either Fifth or Sixth or Susquehanna avenue, and a lager beer woman saw me; I came down her side of the street and saw a light in a window and some one standing at it; got away home as soon as I could; it was now after four o'clock; cleaned myself up and fixed up my shop, but as soon as the body was found that day I was suspected; knew the 'spots' were watching me, and, for three weeks, no matter where I went, one or two of them were watching me, and they gave it up and left."

That was all he told me that time; he told me next he could not kill her in the privy; it was in the cellar that he murdered her; he hurt her to keep her from crying; he put her in through the cellar window and went to get some hair oil. "She began to cry, and I caught her by the neck until her crying was done; when I was done her crying was done;" he told me when he carried the body out of the cellar; that was all he told me then; he told me at another time he got the body and put something in front of it when he went out; he said, "My back was turned to my left; crossed over Diamond street; then turned up Diamond street again; all was clear until I was crossing Susquehanna avenue; there I met Charley Mass;"

he spelled the name for me; I thought it was "Mace," and told him we had a prize fighter in England of that name; he said, "No, Mass," and spelt the name on a slate; he said, "I had on a pair of light plush slippers, for which I gave \$2.50; the way I was dressed and fixed up, I thought Charley would not know me; know Mass was going to the stable to feed his horse, so as to get to market to buy things, as his mother keeps a grocery store; he only lived a few doors from where I met him; if I was going out of Diamond street I turn up Sixth and going straight ahead; Mass was going at an angle crosswise; at the time I met Mass I had the body in my arms; went on to Dauphin street and then to where I put down the body, near to a pond of water on the spare lot; I hardly had it out of my arms until I saw a man coming; then I ran and got behind this barn, a little distance from the place; waited a minute or two; then I went down Sixth street and Susquehanna avenue, and a lager beer woman seen me; she was opening her shutters from the inside; I held down my head and threw up my arms like this (crossing them over his face) so she could not recognize me."

I asked him who did his washing; he told me his wife, at first; then the washing all went out; he told me three different ages of the child; he told me Mary Mohrman was only six or seven years old; I told him he was a liar; he said that was her age; he asked me if I was in his place what I would do; he had friends and money and influence; I told him I would get my friends to

see Charley Mass and the lager beer woman, and try to get them to keep their mouths shut; he said, "I have plenty of time to do that if I am to be brought up;" he asked me did I think the detectives would settle it for money; I told him I didn't know; "How often," he said, "can a detective search your house?" I told him whenever they had a warrant, I supposed; he said, "This Taggart is a 'fly man,' playing sharp;" I said Taggart was marking thieves from New York; he said, "I've a good mind to send for Smith at any rate;" I said, "Please yourself and you'll please me;" he got a shoemaker's hammer and knocked on the door; I told the keeper he wanted to see the assistant superintendent, Mr. Howard Perkins; the next morning he told me he saw the man in his cell, and I think it was the next night Mr. Smith saw him in his cell; he told me the next morning when he came he had seen Smith; he showed me a pipe Smith had brought for him; he said if he had taken her through the cellar door it would have been on the kitchen side; that's the reason he put her through the window; his mother, wife or sister might have come down into the kitchen and seen in; he said there was a little passage between the kitchen and back cellar door, where they kept coal and some old bottles; he said his mother went out with Mary Mohrman's mother that night; he went, too, but returned; he said something about his mother going to visit Mrs. Mohrman at her house; he told me the officers watched him for two or three weeks; he did not say he spoke to them, but said

they followed him; once to his brother-in-law's, and once to a lager beer saloon up to the steps; he told me his wife asked him on Monday morning where he had been all night; he said "fell asleep below and have only just woke;" on Tuesday morning she asked him again, "Where have you been all night?" he said, "Annie, I got into a muss with two police officers," for she saw some blood on the bosom of his shirt; he said, "on the day the body was found I went over to Fisher's lager beer saloon, and stayed there till twelve o'clock, just to hear the conversation, what would be said about it, and I said as they said; they told me they had arrested some man with whiskers on;" he said, "that made it look well for me;" he said there was a subscription made up for Mrs. Mohrman, and he gave some two dollars; that he went the day after the body was found to see it at Mrs. Mohrman's house. He said he had two pairs of slippers, one light, one dark, both plush; he had the light pair on the night he took

the body; he said, "A very strange man came into my shop; I put him down for a 'spot' right away, because he tried to get into conversation with me about the murder; I turned it off to the weather; the cap," said he, "they tried on my head was mine, but they can't prove it; after the Germantown affair happened, I told my wife and mother that I was suspected of the murder of Mary Mohrman, so as to have things fixed up if I got arrested for it."

*John Schriver.* About twenty minutes to nine I saw a man in the alley near Hanlon's house, as described by Hanlon to Dunn, on the night of the child's disappearance.

*Charles Mass.* Saw a man on the morning the child's body was found carrying something heavy in his arms; he was on Sixth street, going towards Susquehanna avenue; was a middle-sized man, about five feet five inches high; rather slim. Did not know him. It was half past three or four o'clock.

*November 5.*

The court room was crowded to-day and the entrances were thronged with people anxious to get admittance. The prisoner looked restless and excited, but, under the circumstances, few men would have been as self-possessed as he was. His young wife and sister sat, as usual, near the counsel.

*John N. Giberson.* Am a brickmaker; the morning on which the body of Mary Mohrman was found I was going on the Germantown road to my work, between three and four o'clock; I saw a man twenty-five

yards ahead of me after I had crossed Diamond street; I was on the east side; the man also; he was about six doors ahead of me; near Germantown road and Sixth street; the man seemed to be carrying something heavy in

his arms across the left breast; he was walking pretty sharp; was apparently barefoot; he made no noise.

*Cross-examined.* The man went up to Susquehanna avenue on the east side of Sixth street; I went five or six paces above the bend on the avenue, and at an angle to the old foundry; at Germantown avenue and Susquehanna avenue; as I was crossing I saw Charles Mass in front of his house; about twenty paces above Susquehanna avenue I lost sight of the man; had my back to him; he was about five feet five inches high; he was slender built; did not know him; did not notice his dress; did not see his face.

*Emelina Welscher.* In September, 1868, I kept a lager beer saloon at the southeast corner of Fifth and Susquehanna avenue; remember the finding of Mary Mohrman's body; got up in the morning and was opening my shutters when I saw a man coming from the brickyard to my pavement; when he reached my pavement he turned down Fifth; he run down a few pavements, and then I shut my windows; I looked out into Fifth street; he ran down Fifth street on my side; I did not see him in the face or take any particular notice of him; he was dark dressed; I could not tell exactly what time it was, but it was toward morning.

*Cross-examined.* He did not run, he walked fast; I think it was about four o'clock; I did not hear the man before I saw him. I only saw him; could not hear him; my little girl cried at that time; I could not tell.

*Anna Emory.* Saw the body of Mary Mohrman on Tuesday morning, September 8, first at twenty minutes past five, lying at the side of the pond; my business is that of dressing and laying out the dead; it was covered with a piece of carpet; next saw it at the Eighteenth Ward station house, on Trenton avenue; saw the injuries upon it; these are the clothes the child had on when found (clothing produced); about two o'clock on Tuesday the body was removed to Mrs. Mohrman's; I never left Mrs. Mohrman's from Monday evening until after the child was buried; on Wednesday morning, the morning the child was buried, Hanlon passed into the house with the crowd; he passed in the front door and out at the back, as the rest of the people did; the body was lying in the front room; the crowd passed in to look at the body, and Hanlon was among them; I raised for Mrs. Mohrman, \$26.72 from the crowd as they passed through, but I don't remember whether he gave any money or not.

*Mrs. Mohrman* (recalled). There was money raised by contribution for me; after I had paid my expenses it left \$4.35 in my hands; the neighbors and others did this; could not tell whether John Hanlon or any of his family subscribed anything.

*Alderman Heins.* I was alderman of the Nineteenth Ward when the body was found; detectives Tryon, Taggart and Levy engaged in the investigation; they worked in my neighborhood several weeks; after investigating the matter for several weeks it was dropped; during that time a number of arrests



were made; all the parties then arrested were discharged except one, who was held to bail for open lewdness; the men brought into the office were generally men who had black whiskers; did not know Hanlon by sight; first came to know him about the time the murder was committed; saw him frequently after that up to the time of his arrest; don't know what name he went by in December; I first learned of what Schriver could testify about the time a true bill was found in this case; never saw Michael Dunn until I saw him in court; never had any conversation with him; am familiar with this locality; in September, 1868, there was a brickyard on the southwest corner of Fifth street and Susquehanna avenue, and a lager beer saloon on the southeast corner.

*William Quester.* Am a butcher; remember the morning when the body of Mary Mohrman was discovered; had been to a watermelon party the night before; left the house twenty minutes before four o'clock the next morning; I crossed the lot at Susquehanna avenue about ten minutes to four; I crossed from Sixth and Tyson streets to Sixth and Susquehanna avenue; after I had crossed Sixth street I saw a man; I stood on the edge of the path, and didn't know whether to go over the path or not; he stood on the lot, pretty close to the old house; he walked around the old house and I went on; he went to the north of the old house to get around; I passed on; after he walked around the old house I saw no more of him; I went pretty smart when I passed the lot until I reached

Fifth and Susquehanna avenue; then I started on a little run; the man was, I thought, about fifty yards ahead of me; it was pretty dark; I did not overtake or pass him, or see anything more of him; cannot describe the man's appearance.

*Cross-examined by Mr. Brewster.* Heard of the murder the same morning; was at home, at my mother's house, about ten minutes past six o'clock; told my mother I saw the man and no one else; I did some time after, I could not say when; I did tell, I don't know who, did not take notice; this thing was a subject of general conversation all about the neighborhood; the nearest I saw this man was about fifty yards from me.

*Joseph Neal.* Was an officer on the police force in September; remember the death of Mary Mohrman; was detailed then, with the others, to take charge of the matter, by Lieutenant Whitcraft; saw Hanlon; no detectives were along with me; had a little conversation with Hanlon at that time; he wanted to know what kind of looking men the detectives were, and how they were dressed; he asked me if they had a right to go through houses; I told him that depended on the nature of the case.

*To a Juror.* Think that was about five o'clock, just after the child was found; it was in Hanlon's barber shop; Hanlon knew me; had my uniform on; never took notice what he wore on his feet in the barber shop; he asked me as he was shaving me.

*Samuel Grant.* Was an officer of the force in 1868; was detailed in reference to this mat-

ter; I was kept on duty about seven weeks.

*Mr. Tryon.* Was detailed for duty in this matter with several others by Mayor McMichael; some four weeks; was not in the house of Hanlon; saw Hanlon only once before, first of March; I told him nothing but what I heard; some time in March I saw him; I communicated that to Alderman Heins; first learned then that Schriver knew of the case.

*Mr. Taggart.* Was one of the officers detailed by the Mayor to investigate this case; was in the neighborhood about three weeks; saw Hanlon frequently; was not in his house; about the latter end of last December I first learned that Schriver knew anything about this case; I never saw him until on the stand here; have seen Dunn two or three times; did not communicate to him any of the facts of this case; was not at the house of Mary Mohrman's mother on the day of the funeral; don't recollect seeing Hanlon that day.

*Mr. Smith.* Am a detective; was detailed to investigate this affair; was engaged three weeks; saw Hanlon; was not in his house until after it was over; saw Dunn several times; did not communicate to him any of the facts of this case; was not at the

Mohrman house the day of the finding of the body; can't say I saw Hanlon that day.

*Mr. Perkins.* Am Assistant Superintendent in the convict department of the county prison; Hanlon came in the convict department ninth December, 1869; Dunn came August 15, 1868; was present at several interviews between the detective officers and Dunn; did not communicate to Dunn at any time any of the facts relative to the killing of Mary Mohrman; no one but detective officers had access to Dunn to my knowledge; none but religious newspapers are allowed to be given to convicts, and these not by visitors or friends, but by the Prison Society; all letters in and out are inspected; they are opened and read; to my knowledge no communication was made to Michael Dunn of the disappearance and death of Mary Mohrman, none whatever, sir.

*Alderman Francis Hood.* Am an alderman of Philadelphia; know the defendant; on twenty-fifth November, 1869, at my office he gave me the name of Charles C. Harris; the business which brought him there did not have any connection with the present case; did not see him again after that until I saw him in this court on Monday last.

### November 7.

The crowd to-day was even greater than the previous days of the trial, and the excitement of the spectators was equally as great.

*Edward K. Tryon.* I at no time communicated to Michael Dunn any of the facts relative

to the murder of Mary Mohrman.

*To Mr. Hagert.* One week ago



I first learned that a man was seen to go behind the old building on the lot; I learned it from Ald. Heins; did not see the witness William Quester until I saw him here upon the stand; prior to the confession had not heard that a man had seen a man go behind the old building upon the lot at Sixth and Susquehanna avenue; a week ago I first learned that the witness John Giberson had knowledge of the transaction he has related; learned it from Ald. Heins.

*Mr. Hagert* offered the plans and clothing of the child in evidence. He said that he had given in all the evidence that they now had with the exception of a witness who might not arrive until late in the day, or perhaps tomorrow. The Commonwealth would like to close, reserving the

right to examine the witness whenever he might arrive, during any stage of the cause.

JUDGE LUDLOW. We are to understand with the reservation of examining that one witness?

*Mr. Hagert.* Yes sir, with that understanding we close.

JUDGE LUDLOW decided to accord the Commonwealth the privilege of examining the witness, but stated that the defense could make their objection when he was produced.

*Mr. Hagert.* We will now close without any reservation, leaving the application for the admission of the evidence of the witness at the close of the defense.

JUDGE LUDLOW. Very well, the Commonwealth now closes without any reservation.

### THE DEFENSE.

*P. F. Carroll*, junior counsel for the prisoner, arose and opened the case for the defense. He said the Commonwealth had exhausted a whole week in presenting their case; had presented a great many isolated facts, which, but for the statement of the infamous witness, Michael Dunn, would not have thrown the slightest ray of light on the matter. He would prove that the prisoner was not where he was said to have been by the prosecution, and, in fact, would establish a complete alibi, and vindicate the prisoner's innocence; he would prove that the witnesses examined in corroboration of Dunn's statement gave entirely different statements when the occurrence was fresh in their minds, and they were examined before the Coroner; and they would produce witnesses who testified before the Coroner, and were not examined here, to prove his innocence; in short, he would prove that at the time of this occurrence Hanlon was in bed and remained there all night.

*John Fischer.* Resided on September 8, at the southwest corner of Fifth and Diamond streets; I sell liquor; remember the night that Mary Mohrman was missing; there were several in my bar room that night; Hanlon was there from quarter past seven to quarter past eight; he had on a white shirt with brown stripes; no hat, no coat, sort of light pants; think they had a stripe down them; he had no coat on when he was at my place; had lived at that house four or five months before that; I don't live there now; lived there a couple of months after the occurrence.

*Cross-examined.* Mine was an old dwelling altered into a bar room—the lower portion; Hanlon was in from quarter after seven to a quarter after eight o'clock; knew the time because I ran out of beer at nine o'clock; Hanlon had five or six drinks during that time; he had on his working clothes; did not see him again after leaving my house that evening; he was in the habit of visiting my house, but not daily; I think he was there when the report came around, the day the child was found; do not remember Alderman Fields being in my house that Sunday evening; don't remember Mr. Strawhouer being in there; did not remain in the bar room all the evening after Hanlon went out.

*Kate Hanlon.* Am going on eighteen years of age; am a sister of John Hanlon; my father and mother are alive; in September, 1868, they resided 2055 North Fifth street; my father, mother, brother John and his wife, my sister, and a smaller brother, and myself lived in the

house; Mrs. Steinmyer is my sister who lived in the house; on the first floor there is a barber shop fronting on Fifth street; back of it there was a small kitchen; there was nothing back of it; outside was the yard; up stairs there was a front room facing on Fifth street; then there was a back room in the second story; in the third story there was a front room on Fifth street, then there was a back room, and that was all; there were two rooms in the third story; there is a cellar to the house; it had a gravel floor; the entrance to it was from the back kitchen; the front room was used for a barber shop; my brother John carried on the business; he was married at the time; he occupied the back second story room; he occupied it for a sleeping apartment; his wife also occupied the same room; Mrs. Steinmyer, my sister, occupied the front second story room; the front third story my father and mother and little brother occupied; the other room I slept in; the back room in the third story; remember the Sunday evening on which this little child was lost; I think there were thirteen in the house on that Sunday evening leaving my brother out; Ellen Quinn, Kate Quinn, Johnny Quinn, Barney Quinn, Annie Quinn, Owen Hanlon, John Hanlon, my father; Bridget Hanlon, my mother; Annie Hanlon, John's wife; Mrs. Steinmyer, Jennie Steinmyer and myself; there were two babies, Jennie Steinmyer and Johnny Quinn; they were both babies; during that afternoon and evening Mrs. Quinn, Ellen Quinn, Kate Quinn, Barney Quinn, and Johnny Quinn came there; they

were there that night; my sister, Mrs. Kelley, and her boy came there to visit; her first name is Mary; she did not remain there all night; was sitting on my steps the early part of the evening; the steps of my house; my brother, John Hanlon, passed me and went over into Fischer's lager beer saloon; that is on the corner of Fifth and Diamond; it was kept by the witness last upon the stand; can't say how he was dressed; he had no coat or hat on; he returned that evening; saw him return; saw him standing by his bar window from where I was sitting; saw him come across from Fischer's; he passed me on the steps and went into his shop; that is all I saw of him; when he passed me going into his shop he had no coat or hat on; don't remember the color of his pantaloons; it was a good while after dark; the next I saw of him was the next morning at the breakfast table; he breakfasted with me; his wife, my mother, and my little brother, Mrs. Quinn, and Ellen Quinn breakfasted with him.

My brother John passed me while I was sitting on the step, into the house; he passed me going out in the early part of the evening; he passed me going in, can't say what time; coming from Fischer's when he passed me; he had no coat on; when he came to the breakfast table next morning he was in his shirt sleeves, he had on light pants; his shirt was not soiled or bloody; think I saw him that evening; when I went to bed I do not remember seeing John; next saw him on Tuesday morning; I saw him when I was going up to see Mary Mohrman,

when she was found; my father was in the house on Sunday afternoon, lying down on the settee; retired at nearly eleven o'clock on Sunday night; was out in the yard on Monday morning; was in the water closet; saw no blood there; I saw none in the yard; could not say what time I went into the yard on Monday morning; it was before breakfast; the cellar was not used for anything but a little bit of kindling wood; after John went in Mrs. Kelley and her little boy and my mother and Mary Quinn passed out while I was sitting on the steps; it was about eleven o'clock or a little before when I went to bed that night; can't remember where I slept; there were so many in the house; did not hear any noise in the house from the time I went to bed until I got up.

*Cross-examined.* My mother, Mrs. Kelley, and the little boy went out first; Mrs. Quinn did not go with them; I can't say where they went; they went up to Diamond street; my mother was gone ten minutes; when she came back, she came back alone; Mrs. Kelley and the boy did not come back; Mary Quinn did not go out with them; she went out after my mother returned; I could not say how soon after; my mother went out about three-quarters of an hour after my brother went into the house; Mary Quinn did not return; was sitting on the steps when my brother went into the house; there was nobody in the barber shop when I went to bed; when I got up the next morning the barber shop was open; could not say what time we had breakfast that morning—the usual time;

that was from six to half past six; my mother generally opened the barber shop and swept it out, and then called John if anybody came in; after my mother passed me, John Hanlon's wife was the second one; she went in; did not see any blood marks upon my brother's clothing; saw my brother John on Monday evening in the barber shop; it was before supper time; I did

not see him when I was going to bed; I saw him on Tuesday morning when I was coming down Fifth street, and he was going up Fifth street with Mrs. Steinmyer; this was early in the morning, when the child was found; the barber shop was open at that time; did not see my brother on Monday morning before I saw him at the breakfast table.

*November 8.*

The excitement was as manifest as before, and the Court found it necessary to call upon the Mayor for a detail of policemen to keep the entrance open.

*Mary Quinn.* Am eighteen years old, past; recollect the night that Mary Mohrman was missed; was at Hanlon's that evening; got there between six and seven in the evening; stayed by the door till dusk, and then went into the barber shop; picked up a weekly paper and sat and read it; after I sat there some time, John and John's wife and his mother passed through; his wife asked for a lamp, and I heard them go upstairs; I heard the footsteps; a good while after that I went into the yard; did not see John Hanlon that night after he passed me coming in.

*Cross-examined.* Am first cousin to John Hanlon; was not upstairs that evening; no one was in the barber shop with me; John's wife did not come in until she came in with him and his mother; she went out to the kitchen; was reading the *Chimney Corner*; was in the yard; was in the water closet; can't tell the time of the evening I was out there; when I got in the barber shop again Mrs. Kelley,

her boy, and John's mother went out; remember these occurrences because I made an engagement to go out with my cousin, Kate Hanlon; before I went home I heard the child was lost; there were bells in the street that evening; have not heard them on any other Sunday night; there was great excitement, that is the way I remember, because I remember on that evening I was to go to a young lady's house; that is the reason I remember so particularly; when I heard that John was suspected of it they asked me if I remembered that evening and I said I did; I had no talk with John of it; it was a long time after John had been arrested; they asked me what I knew about it, and I told them what I told you; told his mother, and when the lawyers asked me told them; saw no other persons that evening except John, his wife, his mother, and Kate; I think when I went through the kitchen I saw his father lying on the settee; did not speak to his father.

*Mary Kelley.* John Kelley is

my husband; have been married seven years; live at 2059 Germantown avenue; my husband is a liquor dealer; I have a family; one boy living; am John Hanlon's sister; he was a barber after he came from the army in 1866 or 1867; set up business in Fifth, below Diamond; he lived there in September, 1868; my father, mother, two sisters, two brothers, and John's wife composed the household; the second story front room was used as a sitting-room, there was no bed in it; there were two rooms in that story; the back room was used as a bed-room; my brother John and his wife used it to sleep in; there were two rooms in the third story; they were used for sleeping-rooms; the yard was paved; there was a goat-house in it; there were two gates each side, a kitchen-door, two windows, a cellar-window, and a water-closet; one window from the end of the barber-shop and one from the kitchen; the window from the barber-shop was over the cellar-window; the other was pretty near it; was at John's house on the night of September eighth, 1868; went from my own house; it was after people went to church; took my little boy to my mother's; my sister and my cousin were sitting on the step, my sister Kate and Ellen Quinn; asked them where my mother was; she was just coming out in the barber-shop; had some ice cream, and went up stairs with my mother; went up to John's room, that is the back room of the second story; he was in bed and his wife was getting undressed; I called my sister out of the other room (Mrs. Stein-

myer); she came from the second-story front; my mother went down stairs for saucers for the ice cream; my little boy went alongside of the bed and my brother John lifted him up; then we all eat some of the ice cream; my mother, my sister Lizzie (Mrs. Steinmyer), John, his wife, and myself; sat a few minutes; then I went down stairs and went home; lived about three doors below Diamond Street, just around the corner from Fifth Street. I first spoke of this affair after John was accused of it; when I seen it in the papers.

*Bridget Hanlon.* Live in Jersey, my husband is alive; we are living at Millville; am the mother of John, the prisoner; he is twenty-two years of age; married, could not say how old his wife is, sixteen, I think; in September, 1868, was living at Fifth and Diamond; my husband was living there; he was a laborer at that time; John and Lizzie and Kate and Owen were in the family living with me in this house in September, 1868; remember the Sunday evening on which Mary Mohrman was missed; at that time Mr. Hanlon, me, Lizzie, Kate, Owen, John, his wife, Mr. Steinmyer, Jennie Steinmyer, Kate Quinn, Johnny Quinn, Barney Quinn, and Annie Quinn were there; John's wife was there; Mrs. Quinn is my sister; John was at dinner; he went out near night; he returned again to the house; when he returned, I saw him at the corner of Fifth and Diamond; John came across from Fischer's until Fifth Street; came down and went up the front steps, and I came after him; he went back in the kitchen;

his wife asked me for a lamp; I got the lamp, handed it to his wife; he and his wife went up stairs in the back second story; when Mrs. Kelley came with the ice cream; John and his wife, Mrs. Kelley, Mrs. Steinmyer, and me ate the ice cream; went down for saucers and spoons; we then came down stairs; Mrs. Kelley asked me to go to the corner with her; went with her to the corner of Fifth and Diamond; we stood there a few minutes, and she went home; I stood there a few minutes, and I came down home to my house; my husband this afternoon was lying on the settee in the kitchen; he had a sprained knee; he was on the settee pretty near a week with a sprained knee; there was little kindling-wood in the cellar; it was nice and clean; a little gravel; a nice floor; it was not bricked; there were no bricks at all; when John went out of the house he was dressed—in his shirt sleeves; his pants were a kind of a light, with a stripe down them; when he returned saw him in the house; he was in his shirt sleeves; when I saw him on Fifth street he was in his shirt sleeves; he had no coat on; he had no hat on; when we got back to the house, he had the same shirt on; that night myself, my husband, Mrs. Steinmyer, John and his wife, Kate, Owen, Mrs. Quinn, Ellen Quinn, Barney Quinn, and John Quinn slept in the house; all these Quinns came there on Sunday afternoon; saw John next

morning in bed, about half-past five or six; used to clean up the shop and sweep it in the morning; would put the kettle on, and then open the shutters of the shop, and then go and waken John; wakened him that morning; he got up; he was dressed the same as he was the night before; he eat breakfast with me that morning; he was dressed the same as he was the night before—in his shirt sleeves; we have breakfast about half-past six generally; was out in the yard this Monday morning; was in the water-closet this Monday morning; was in the cellar this Monday morning; there was no blood or traces of it in the cellar, in the yard, or in the privy; did John's washing; Tuesdays were my wash days; I washed shirts; washed the following Tuesday, the Tuesday succeeding this Monday; always washed on Tuesday; his washing was never given out; washed the shirt that he had on the Sunday night and Monday; believe he wore it on Monday; washed it the next Tuesday, that is, the Tuesday following the next Monday; saw no blood marks on his shirt; there were none on it; he had no blood on his pantaloons or any of his clothes; he wore the same pants on Monday that he had on Sunday; there was no blood on them; there were none of his clothes missing; Mrs. Conathy's house was in the same lot; there was a fence between the yards; the two water-closets were together; a lath and plaster wall separated the two water-closets.

The court, after an adjournment at one o'clock, opened at half past two, when the trial was proceeded with. As



in the morning, the room was densely crowded with people, a very large portion being women. Long before the doors were thrown open the crowd besieged the place, so that it was impossible for any one having business in the court to force their way through, and the officers were kept busily engaged in preserving order. The only means by which the reporters could gain admission was by climbing through one of the windows.

*Bridget Hanlon.* Know the little cellar window; we kept chickens down the cellar; the chickens made too much dirt in the cellar, and we nailed the cellar-window up; Mr. Hanlon, my husband, nailed it up; it was nailed up at the time of the occurrence, and remained that way after we left; after we moved I visited the house again; John and his wife lived there then; in the yard there were alterations and changes; they made a garden; John made it; he pulled the bricks up; the bricks were put in the cellar; John generally wore upon his feet about the barber-shop boots and slippers; they were leather slippers; he had no other slippers at that time; he had cloth slippers with heavy soles, half heels; I never knew him to have plush slippers; am 46 or 45, I don't know which.

*Cross-examined.* Slept that night in the front room in the third story; there were a good many slept with me; Mrs. Quinn's children; there were so many I don't remember; Mrs. Steinmyer slept in the bed with me; don't recollect where the children slept; went to bed between twelve and one; got up in the neighborhood of five; did not get up from the time I went to bed until I got up at five in the morning; after I came out

of the water-closet I went into the kitchen; I stayed in the kitchen; I did not stay there until I went to bed; remained there a long time and then went down the alley; I then went to the kitchen and stayed there; went down the back alley; I stayed in the back alley; I then went in Mrs. Mohrman's, wakened my little boy, and took him into my house; went into the kitchen and went up to the third-story front room; did not go to bed then; put him to bed; came down and fastened the back door; looked out of the front third-story window; it was in the papers I first heard that my son was suspected; he was in prison at that time; it was after he was sent to prison when it was put in the papers; up to that time had heard nothing about his being suspected; did not take particular notice of his clothing any more than at any other time; he had no pants but the one pair; I was making him a pair; he had five shirts; he did not change his shirt on Monday, and went out in his shirt sleeves on Sunday; could not say how many days he wore his shirts; John Hanlon was in the shop when I handed the lamp to his wife; can't tell what we had for breakfast the Monday morning; I can tell who took breakfast; John went down

town this Monday; he bought things on Monday for the shop; Monday was his shopping day.

*Lizzie Steinmyer.* Am John Hanlon's sister; am married woman; in September, 1868, I resided in Fifth Street below Diamond, with mother; remember the evening Mary Mohrman was lost; in early part of evening was in the front second-story room; remained there for some time; stayed there until my sister Mary (Mrs. Kelley) called me; went in the back room, and she had ice cream, and I sat and helped to eat it; John and his wife, mother, and Mary, and little Johnny were in the back room; my brother John was sitting up in bed; can't say how long I remained there; went upstairs to the third story when I left the room; the front third-story room; my little girl was crying; I went to bed a short time afterwards; the little cellar door in the yard projected about four or five inches; the cellar window on Fifth Street was a plain wire window; it was about eighteen inches wide, it had a lap on the window with a catch to it inside, and you could not unhook it without going in the cellar; saw John on Monday going into town, about nine o'clock; next saw him Monday evening when I came home from the city, about five or six o'clock; he was standing with his foot on Mrs. Mohrman's step; Mr. Strawhouer was reading the evening paper, there was a piece in the paper about the child being lost; saw him Tuesday morning about six or half past six o'clock; report came around that the child was found; my sister started up with another

girl; him and I was last; he a little ahead of me; we were running to see the child; I did not see the child, it had gone; sometimes John would wear slippers; I can't say for sure what kind of slippers he wore at that time; I made him a present of a pair; don't know whether they were the pair he used.

*Cross-examined* When John went to town, on Monday morning, he had a straw hat on, light pants, dark coat; did not take notice if he had a vest on. On Tuesday think he had the same pants on; he was in his shirt sleeves; he had no hat on; remember the Monday morning that Mary Mohrman was missed; don't remember whether I was out in the yard that morning; was out in the water-closet early, before daylight; my sister-in-law was with me (John's wife); could see in the privy at that time; there was no blood or trace of blood there at that time: don't remember being in the cellar on Monday; might have been there on Tuesday, for I often went after the victuals, sometimes two or three times a day; don't remember seeing any blood or traces of blood there, or any blood on the stairs leading to it, or in the kitchen, or in the yard, or on any part of the little window, the sill, or any part of the wood belonging to it; did not examine any part of it to see if there was any blood upon it; if it had been there I would have seen it; did not examine the stairs to see if there were any blood or traces of blood there; did not examine the kitchen for that purpose, or the yard, or the little window, or the sill belonging to it; never thought of blood



being there, but if there had been blood I would have seen it.

*November 9.*

*Owen Hanlon.* Am brother of the prisoner; am going on 15; remember September, 1868; reside with my father and mother; remember the Sunday that Mary Mohrman was missed; was playing on the cellar-door at the corner of Orkney and Diamond Streets that Sunday afternoon and evening; Lewis Mohrman and John Strawhouer were playing with me; it was after dinner before dark; did not see John that day after he (John) closed the shop; he closed the shop between one and two o'clock on Sunday afternoon, that was the last I saw of him that I remember; was helping him working; lathered a man and combed the hair; he had on a light striped shirt, light pants with dark stripes down the legs; next saw him the next morning at the breakfast table, Monday; he had on the same shirt and pants that he had on Sunday when I was working with him; next saw him after breakfast in the shop; don't remember having seen him Tuesday; was in the yard on Monday afternoon; was not in the water-closet; was in the cellar on Monday, in the afternoon; there was no blood there that I saw; went there to get a stick to go out in the woods to see if we could see anything of the man with Mary Mohrman; Lewis Mohrman, John Strawhouer, and John Crees went with me; we all had sticks; we came back about four o'clock in the afternoon; a small pile of kindling wood was in one corner of the cellar, and a water trough in the other; re-

member the cellar window; I can describe it; the cellar window was nailed down—the back one; it stuck out, and when we went to open the gate it stopped the gate; the cellar window was used for chickens to go in, it had pieces of board on the side, and when the flap was raised up, with a stick under it, the gate would not open, then there was a board on the bottom, then it went against the board; the stick was put under the bottom to let the chickens in first; it remained nailed down until we had left.

*Cross-examined.* Saw Mrs. Kelley that Sunday evening at the corner of Fifth and Diamond; was then looking for Mary Mohrman; was just going to ask mother if I could go and look for Mary Mohrman, when she was standing at the corner; my mother, Mrs. Kelley, her little boy, and Mrs. Mohrman were standing there; Mrs. Mohrman had been looking for her daughter before that; I had not been with Mrs. Mohrman before that; I did not see Mr. Fischer that night; John used to wear boots; remember him having one pair of slippers, but I don't know whether it was that time or not; they were dark black cloth, worked on the top with zephyr; don't remember any other; was not with him when he purchased slippers.

*Mary Quinn.* Left the house about ten o'clock; went directly home from Hanlon's; my house was at Second and Diamond Streets; the reason why I did not stay at Hanlon's that night was because I always lived at Second and Diamond, and I had to be there; did not live at home; my mother lived at Sec-

ond and Jefferson, I think; she kept house; I did not see John Hanlon that I remember.

*Cross-examined.* Went home that night at Second and Diamond, Mrs. Patrick Kelley lived there, she was a relative of mine; she was my cousin, and a sister of the prisoner; I lived there from the time I was small; I did not live at home.

*Mrs. Ann Quinn.* Am a married woman; my husband carries the hod; I have five children; Mary, the girl that was last on the stand, was living with Pat Kelley; she is now living with my sister; don't know how old she is; don't know any of their ages, to be perfect; remember the Sunday on which this little child was missed; was at home after dinner, and my husband was in liquor, and I could not stay in the house, so I took my little boy in my arms to take him to my sister's, and the rest of the children said they would not stay behind me, so we all went together to my sister's; my sister was Mrs. Hanlon, the mother of John; don't know what time I reached my sister's, can't say how long it was after dinner; when I got there dinner was over; no one was there but my sister's husband lying on the settee in the kitchen; stayed there for a long time with my baby on my knee, and it went to sleep and I took it upstairs and laid it on the bed with Mrs. Steinmyer's baby, in the front room, the garret one; came down stairs and stayed there until the lights were lit; Mr. Hanlon was in the back kitchen; he was here all the time; saw John's mother; saw John himself; he came in and his mother

came in; his mother came first, and he came after; his wife was with him; his wife asked his mother for a light, and his mother lighted the light and gave it to his wife; his wife went first and he went after her up stairs; heard Mrs. Kelley's voice after awhile; stayed in the kitchen; no one was there but Mr. Hanlon; could not tell how long I stayed there; went up stairs after a good long while to see about my little boy; went into John Hanlon's room, and he was lying in bed with his wife; went in and took the lamp which burned on the mantel-piece; went up into the garret then, and Mrs. Steinmyer's baby was there; took the lamp down with me and left it on John Hanlon's mantel-piece, and he was in bed; went to the back door, opened the door and heard voices of the people talking at the bottom of the alley on the back street; I went there to get clothes to change the baby; Mrs. Hanlon was at the alley talking to the neighbors; went up stairs and changed the baby, and took the light off of John Hanlon's mantel-piece, after I changed the baby I came down and left the lamp on the mantel-piece, then went all around the cellar to look for some big pieces of wood; took the lamp and left it on John Hanlon's mantel-piece again, and he was lying in his bed; stayed in the back kitchen pretty much through the night; Mr. Hanlon was lying on the settee, and there was a lamp burning in the kitchen all night; saw John the next morning; could not tell the time, it was a good while on in the morning; it was after breakfast; I came through the day;

after I left Hanlon's I went to where I lived, to Front Street; such a thing as blood could not be in the cellar, for I looked all around for some large pieces of wood.

*Cross-examined.* Was looking for wood; I did not think of such a thing as blood; the kindling-wood stood at a distance from the bottom of the stairs; went all around it to look for large pieces; saw John Hanlon on Sunday when he came in to go to bed; that was the first I saw of him; was at Hanlon's at tea-time on that Sunday; went up to put my baby to sleep; went up stairs when they were setting the table; I saw the family at the table when I came down; did not see John Hanlon there; think it was about six o'clock, or somewhere there, when they had tea; the lights were lit when I took the baby up stairs; do not know where John's wife was when they were clearing away the table; did not see John go out of the house that evening; he could have gone out of the kitchen while I was there without my seeing him; he could not have gone out after the lights were lit; he did not go out after he went to bed; there was a lamp burning in the kitchen when she lit the lamp; don't know how long the lamp was lit that was burning in the kitchen. At the time I first went up stairs I put Mrs. Steinmyer's baby in the crib; it was lying asleep; the time I first went up my baby went asleep on my knee; when I went up the second time, was uneasy about my baby, and when I came down the lamps were lit; I can't tell the time I first got to Hanlon's house;

there was no one there but Mr. Hanlon, and me when I first went in and my children who were with me; could not tell how long it was when I first took my baby upstairs; took the lamp and put it on John Hanlon's mantelpiece; he was laying there still; came down again and opened the kitchen door, and heard them talking up the alley; took a lamp up the second time; I got the lamp, off John Hanlon's mantelpiece; he was laying in bed with his wife; was not in John Hanlon's room before Mrs. Kelley came; think I went into John Hanlon's room for the lamp four times, and put it back again; every time I took it I went back again; made the feed for Mrs. Steinmyer's baby; my baby slept all night; it was a big, healthy baby; did not see Mrs. Steinmyer when I fed the baby; don't know whether Mrs. Steinmyer was in bed or not; I know nothing about it; stayed there until my sister came up; after I fed the baby; it struck twelve before I fed the baby a good while; I could not sleep that night because I was uneasy about my children, and my husband was drunk; did not lie down except when I rocked the child; when I went into John Hanlon's room I saw him; I could not go in without seeing him; the bed was right forninst the door; he was lying in bed; could not tell when I first heard that John was suspected of this crime; he was three weeks arrested before I heard of it; don't mind who first told it to me; did not talk to any members of the Hanlon family what I could testify to here; all that I said was that I

could testify to what I knew, that what I knew I could say at any place.

*Elizabeth Steinmyer* (recalled.)

*Mr. O'Neill.* Do you wish to correct a mistake you made in your testimony? Yes, sir. I made a mistake yesterday when I spoke about the slippers where they were made at; I could not say positively where they were made at, I thought they were made at Dalzel's; it was my sister got them made, and I paid for them; I was sick at the time; Mr. Becker, Second, above Diamond, made them.

*Mr. O'Neill.* When you found out your mistake did you go to see Mr. Becker? Yes, sir, I went right away.

*Mr. O'Neill.* You said your sister got them made; is she here; what is her name? My sister Annie; she is married; her name is Ann Kelley; I lived in New York before this trial commenced; my husband is there, he is a barber; he has been there about five weeks; I have lived in New York about three weeks.

*Justice Becker.* Live 2104 North Second Street; I keep a shoe store; know Mr. Kelley's wife; she lives three doors below me, but I don't know his first name; think his first name is Pat, but don't know; remember about three or four years ago, Mrs. Kelley came into my store with a pair of slipper uppers; she wanted me to put the bottoms on them; I did it; can't remember whether it was cloth or knit, but I think it was cloth; I think it was \$2.50 or \$2.75 that I charged; I put on white sole leather; white bottom stuff; they were double soles; can't tell

whether they were high heels or not.

*John Hanlon, Sr.* Am about fifty-five; am the father of the prisoner; there are seven children living; am a laborer—all kinds of laboring; remember the Sunday the little child was lost; was then living on Fifth Street, below Diamond; my family was living there with me; John was living with me; remember the afternoon of that day; I was in the house, in the back part, in the back kitchen; was lying on the settee; don't remember whether I was lying on it in the afternoon, but I laid down after I got my dinner, I laid there all night, had a sprained knee; had had it about a week at that time; do not remember seeing John, my son, that afternoon; do not remember seeing him pass through the kitchen that night; no man passed through the kitchen that night; I do not remember seeing him the next morning; spent the entire night on the settee and the next night; don't remember seeing John on Tuesday; was out in the yard on this Monday, was in the water-closet; there was no blood there that I seen; saw none in the yard; remember the cellar-window on the back part of the house; there was a cover to it; it was closed at that time; the cellar at that time had nothing in it but some light kindling-wood, a spade, and a pitchfork, and some kind of a watering-trough, which was put in out of the stable; it was used for keeping ice in before I got it; there were no bricks there then; moved away from there I think in the April after that happened; left Johnny and his wife

there; this thing at the cellar-window was used for closing the window up; when we had the chickens in the cellar it was open; when they were taken away I nailed it down.

*November 10.*

*Henry Hoffman.* Live at No. 817 Charlotte Street; am a barber; I know Hanlon, I was there at his home in 1868; at the time I was there he was making a garden; saw him make it; he tore up the brick, and dug it up awhile, and after that he made a small fence; the bricks were laying on one side of the yard; don't know where he put them; I saw the garden completed; it was not so very large; a very small garden; it was not sodded when I saw it; can't fix the time; it was in summer, think after the Fourth of July.

*Mrs. Ann Kelley.* My husband's name is Patrick Kelley; live at the northwest corner of Second and Diamond; know Mr. Becker; he is a shoemaker; I ordered him to sole a pair of slippers about the third or last week in June, 1868; got them about the Fourth of July the same year; they were black cloth slippers, worked with zephyr, double soles; they had heels.

*James M. Fletcher.* Was Coroner Daniel's clerk in 1868; remember Mary Mohrman's death; there was an inquest; it commenced the eighth and ended the thirtieth of September, 1868; was present at each meeting as clerk for the Coroner; I took notes; the original notes were torn up when Coroner Daniels went out of office; they were written in lead pencil; the copy

is in the book and you have a copy; Mr. Daniels' has the book, I believe, (book handed to witness); this is the Coroner's evidence.

*Cross-examined.* Was the Coroner's clerk six years; never had occasion to make alterations or interlineations in the original notes; cannot tell whether I made any in the Mohrman case; when I came to copy them off I copied them correctly; did not take any notes down in the form of questions and answers; did not take them down phonographically. All the murder cases that appear in this book were taken down in my time. I have appeared in other cases.

*To Mr. Hagert.* Don't remember what time Caroline Dinglacker's statement was taken; she was not sworn; the examination took the form of a conversation between her and the Coroner; she being excited, it was with great difficulty that anything could be gotten out of her; there were twenty or thirty persons in the room; children and grown persons; think the witnesses were examined in the order I read them; don't remember; no counsel was present; no one represented the Commonwealth.

*Louisa Adams.* Was married the next year after this happened; before that my name was Louisa Rice; am the Louisa Rice examined before the Coroner; remember the night of Mary Mohrman being missing; was standing on the corner of Fifth and Susquehanna Avenue, between church time and the letting out of church; I was talking to a young gentleman; saw a man passing up on the left-hand side, up towards Susquehanna

Avenue; he had a child in his arms, and the child was crying; he says, "Don't cry, Mary, I will give you five cents, I am your uncle"; the child was bare-headed, barefooted, and had a pink-and-white dress on; the man had on dark clothes and a black cap drawn over his eyes; he passed on up toward Dauphin Street, to Dauphin; told the Coroner this; was not there when Caroline Dinglacker was there; when I was there a dress was shown me; I recognized it as the dress the little child had on when carried in the man's arms.

*Cross-examined.* Was standing on the corner of Fifth Street and Susquehanna Avenue, Mrs. Glick's corner; had been there but half an hour; was talking to a young gentleman; his name was David McVey; I was waiting until the lady got ready to come out—the one he went to see; she was in the house at that time, 2221 Reese Street, above Susquehanna Avenue; was standing at the corner, near the house; the man was right across the other side by the brickyard; he had reached the corner of Susquehanna Avenue when I saw him—the brickyard corner; when I last saw him he was going up towards Dauphin Street; he had passed Susquehanna Avenue; did not turn to look after him; said nothing to Mr. McVey about it at the time; went home when I left the corner; did not see the clock at all that evening; did not hear the time strike; did not take any notice; when the people were going to church I was standing on the corner; had been standing on the corner about five minutes when I saw the people going

to church; did not know Mary Mohrman; he was carrying the child sitting up on his right arm; the child was crying but not so very loud; heard the next morning (Monday morning) that Mary Mohrman was lost; stayed at the corner about a quarter of an hour after I saw the man with the child; I suppose he was about half way up between Susquehanna Avenue and Dauphin; did not hear it afterward; did not take any notice whether it cried after it passed me or not; did not take notice whether the child's dress was a high-neck dress or low-neck; did not see the child's face; saw the back of the child's head; it was bare-headed; noticed nothing on its head; could take notice of the dress because it was pink and white, a white dress with pink stripes; did not see the man's face; he had his cap pulled over his face; did not take any notice of his face at all; could tell by his hands that he was a white man; did not know where Mrs. Mohrman lived at that time; lived at that time near a square above; did not go and tell Mrs. Mohrman about it, for I had no time; was before the Coroner; the detectives came to see me about it.

*Emma Criger.* Remember the Sunday on which Mary Mohrman was missed; heard that a child was missing, and then went up and told them what I had seen; went to the Nineteenth Ward station-house; was examined by the Coroner on the following Tuesday after; was examined under the name of Emma Springer; I was walking up Dauphin street, and as I got to Fifth and Dauphin I saw a man



carrying a child; he had the child on his right arm; she was crying and hollering for "my mommy"; he says, "Don't cry, sissy, for I am your uncle"; he says, "I will give you five cents"; he put his left hand into his pocket; he gave her something, whether it was five cents or not I can't tell; he crossed across the crossing to the right hand side of Dauphin; he was a tall, slim man, light pants and a light coat; he had two patches on his coat; one in the shape of a V and the other a square patch, and a black cap drawn over his eyes; he walked very light, as if he had on no shoes; I think he had a sandy goatee and a sandy moustache; when he spoke to the child, he spoke broken English; he walked up Dauphin to Reese; then put his hand up to his face and threw something into the weeds; could not see what it was; he walked through Reese Street to York; that is the last I saw of him that time; about ten o'clock I saw him coming back; he had not the child with him at the time; he walked lame, as if his right foot was shorter than the left one; told Taggart, and think it was the lieutenant of the Nineteenth Ward, about his throwing something into the weeds; Taggart and two other detectives, think, Louisa Rice, and myself went up; he asked me to show him what place it was I saw him put his hand up to his face and throw it into the weeds; Taggart then searched the weeds and I left; about a week after saw the same man at Water and Callowhill; it was on a Saturday night, and it was raining; went

up and told them in the Nineteenth Ward station-house right away that I had seen the man; Lieutenant Witcraft and two other police came down; came down with them at the time; again they got down he had disappeared; that is all that I can remember.

*Cross-examined.* Have been married since last March; my husband is a stone-cutter; my name was Emma Springer before I was married; told Alderman Heins all I told here, except seeing the man on Saturday night; was examined a week after they held an inquest over the child; Louisa Rice and small children were examined that day; told at the Coroner's all that I told here; all but that about Mr. Taggart and the detectives; it was not until after that they examined the weeds; Taggart and I did not go up to examine the weeds until I gave in the evidence to the Coroner; was at Fifth and Dauphin Streets when I first saw this man at the corner; I was just crossing the corner on the left side; I turned and looked at him; after he left the corner of Fifth and Dauphin he went towards Reese Street; did not see the child's face, because he held the child's face to him when the child commenced crying; he turned the child's face away whenever he saw me coming towards the side he was walking on; to the right while he was crossing; he held it away so that I could not look at its face; don't know what he pulled out of his pocket; he pulled it out with his left hand; he carried the child on his right arm; he moved his arm, the one which

he was carrying it on; he lifted her up; he moved her head away; he did not use his left hand to her at all; he turned it away so that I could not notice here face.

*Mr. Haggert.* Did you not say to the Coroner, the man said, Don't cry, sissy, I am your uncle, and that he put his hand in his pocket and pulled out five cents? I did not explain it that way. At Reese and Dauphin he stopped and put his hand up to his face and threw something into the weeds; don't know what it was; told them at the Coroner's that I thought that he had a false moustache, but I could not say positively about it; I said he had a false moustache, that he pulled it off and threw it in the weeds, but I did not say I knew him by his face.

*Morton McMichael.* Was Mayor of the city in September, 1868; I issued my proclamation on the ninth of September, offering a reward of \$1,000; it appeared in all the newspapers on the tenth of September, 1868—have not a copy of the paper in my possession.

*Emma Criger* (recalled). When I was before the Coroner I told him that the man walked light, as though he had no shoes; they had a man up at the Nineteenth Ward station-house that I thought looked very much like him; have not seen him since; it was in the early part of the evening that I saw him at Water and Callowhill; he was standing in front of a liquor store; was down at a dance; Billy Kelley kept the place.

*Albert E. Hollowell.* Am thirteen years old; live with my grandfather, Joseph Oat; he is a carpenter; remember the time

Mary Mohrman was lost; saw a man in Montgomery Avenue; he was about five feet in height; sandy goatee and moustache; saw him two days after I heard of the Mary Mohrman affair; I saw him first at Ninth and Montgomery Avenue; he was walking around; it was half-past six in the evening; he went up Sisty Street, in one of the cellars; he spoke to me; there was nobody else with me at that time; I went over home and told my grandfather; I went into the house and got him something to eat; I took it to him; he talked to me then; he stayed there and ate the bread; I did not do anything; Joseph Gallagher was with me then; he is a boy about sixteen years of age; the man went down to the flagman's box; I followed him; he left a burdle; not before it was into my grandfather's house did I see it; it was there one day; it was tied up; he gave the bundle to Frank Phillips; he went around to the cellars again; I got him two wheelbarrows, and he made a bed out of them; the watchman came and drove him away; Thomas Blackburn was the watchman, my grandfather's private watchman; he went into the cellars of new houses on Sisty Street; they were unfinished, the walls were just a getting built up; he went down Tenth to Jefferson, then he went into a lager beer saloon at Jefferson and Mervine, and stayed there about an hour and a half or two hours; he had a cap on his head when I first saw him; he stuck it in his pocket, and I gave him a straw hat; he raced Joseph Gallagher and me; went down to Tenth and



the man gave was Tate—Samuel Tate.

*P. E. Carroll.* Am junior Counsel for the prisoner. At the instance of Mr. O'Neill I went to a barber shop in Dock street, below Spruce to find the man, and was directed to Water Street, and then to Spruce Street wharf; I found him, and took him to Mr. O'Neill's office, where he said if he had time he would find other witnesses to the same effect; he brought one with him this morning; I think his name is Thomas Peirce.

*Mr. Brewster* said he had no knowledge of this information before he received it from Mr. O'Neill.

**JUDGE LUDLOW.** Under the oaths taken by the prisoner's counsel, we cannot doubt the course we ought to adopt in this case, and therefore allow them to examine the witness.

*Samuel Tate.* Am an oyster-man; and live at No. 316 South Front street; knew Michael Dunn, who was examined in this case; last seen him twelve or fourteen months ago; seen him in cell letter A, south side, second floor, Moyamensing Prison; had a conversation with him there.

*Mr. Brewster.* State, if you know whether Dunn at that time had access to any newspapers, and if so, what were they? Yes, sir, he had; I gave them to him myself; they were the *National Police Gazette*, the *Philadelphia Inquirer*, and different other papers.

*Mr. Brewster.* Now what had the *Police Gazette* in it?

*Mr. Hagert.* I object; the best evidence of the contents of the paper is the paper itself.

*Mr. O'Neill.* Then we call up-

on the Commonwealth to produce it.

*Mr. Hagert.* It never was in our possession.

**JUDGE LUDLOW.** The paper must be produced, or its loss accounted for, before secondary evidence of contents is admitted. Objection sustained.

*Mr. Brewster.* Did you know if those papers of which you have spoken, contained an account of the murder of Mary Mohrman?

*Mr. Hagert.* This is still more objectionable, because leading.

**JUDGE LUDLOW.** Objection sustained.

*Mr. Brewster.* Did you, twelve, thirteen or fourteen months ago, converse with Michael Dunn upon the subject of the reported murder of Mary Mohrman?

*Mr. Hagert.* That is also objected to; this witness is to be treated as if he had been called with the other witnesses for the defense, and these questions should have been asked Dunn if he was to be contradicted.

(After further discussion, the objection was withdrawn.)

*Samuel Tate.* I did.

*Mr. Brewster.* Did he know of her death at that time, and the circumstance connected with it, as they were made public? After he had read the paper I gave him, he knew; this conversation was on the convict side of the prison; I was a cutter of leather at the prison; I was convicted of larceny and served out my time; I worked in the cell next to him and talked with him through the hole in the wall every day, and he asked me if I had any papers.

*Cross-examined.* I got out of prison on that charge on the seventh of December last; have

been in since on the charge of carrying concealed deadly weapons; the first charge I was in for three years; was not in for safe blowing; that was not my first conviction; in 1861-2, I was convicted of burglary; that was the beginning of it, and September last was the end of it as far as I have got; those were my only convictions; was not on the twenty-third of October convicted of forgery in this Court and sentenced to one year in the penitentiary; was in Moyamensing prison then; Francis Evans was convinced with me for burglary; do not know what became of Evans; he cut his way out of prison and escaped; the house No. 316 South Front Street is tenanted, and I rent the third-story back room; I occupied it two months; I showed these papers to Dunn twelve or fourteen months ago; John Dunn occupied the cell in which I gave the papers; John Dunn was the man to whom I showed these papers; that is the only name I knew him by and he told me that was his name; I got these papers from a prisoner named Henry Smith, who was in the cell beneath me; we traded out of the window; he gave them to me, I judge, sixteen months ago; I put a line from out of my window, and he tied them to it; I made the line out of shoe-threads; kept the papers in my cell, generally in the pillow, and I had them a month or two before giving them to Dunn; have not read one-tenth of the report of this trial.

**Michael Dowling.** Have been following the oyster business down the bay for two months; was in no business before that;

had a conversation in his own cell with Dunn in the presence of the instructor; was half-cutter there; had been put in on the charge of larceny and burglary; talked with him on several subjects, about the murder of Mary Mohrman; he read it from a paper in our presence, from the *National Police Gazette*, a New York paper, and the *Philadelphia Inquirer*; it was about twelve or fifteen months ago; Thomas Peirce was his cell-mate; Charles Mutant was the instructor; don't know what Mutant was put in for; he was instructor in shoe-making; I was in for larceny, burglary and house robbing; was acquitted of the charge of murdering Fillen; have not seen Michael Dunn for a year; was not in court when Michael Dunn was examined here; I don't know what he testified, but I heard him say he would sacrifice his mother, wife, or any one else to get his pardon; he halloed this down the pipe; I got out June sixth; when I was in prison I was in cell italic A; he was in the roman letter A when he halloed that down to others as well as me; he told it to others in the presence of Mutant, Peirce and myself; he halloed down to a man named Mead, in cell letter H; was not in the cell with him then; he made the remark in the presence of Mutant, Peirce and myself in his cell; we were all in the cell together; the reason why he made these remarks was that he wanted to get out of the institution; I said he ought to be ashamed of himself to say what he did; I went to his cell twice a week; was not in New York in October of this year, nor was I charged with

false voting there; this was a mistake of the newspapers.

*Mr. Hagert.* How much money are you to get for swearing here? I don't know who is to get money; Samuel Tate sent for me and told me to come or I would be sent for; was here at the recess of the Court; went over to the corner; was two hours with Sam Tate and two other oystermen; there were four of us talking of the case; did not say there was \$500 offered for the men who would swear to this; did not say this to Kit Manley; don't recollect who all were with me; Peirce was not; did not see him in court this morning; conversed with Dunn in his own cell; I forget his letter; can't say where he was; know the letter of the other cell, and could find him, but can't say I could find them all; remember the paper, because I put my name on it; sent it to a man by the name of Carroll, and it was sent to Dunn; told Tate to send it to Carroll; he sent it to Dunn; was in Tate's cell, Dunn's cell and all I named are on the same floor; don't know the date of the paper; think it was cool weather when the paper was sent; I don't know if fires had been built in the prison then; it was a New York paper, the *National Police Gazette*; there were pictures in it; don't think it was the *Ledger*; I got my information of this case from that paper and hearing Dunn, and also from the *Inquirer*; can't tell all the papers I saw in the cell; there was a bundle under his bed; don't know if he received them daily; I only knew the child was murdered, but don't remember when

or where; there was nothing more in it to my recollection; I could tell then, but have forgotten now; believe it stated that a reward had been offered; John Hanlon's name was not mentioned as I recollect or know of; only heard the officers were on the track of the murderer; the statement in the *Inquirer* was something similar to that in the other papers; I don't know what became of the papers; I saw them last at Dunn's cell; don't know where Mutant is now; Sam Tate told me I was wanted here, and that if I did not come I'd be sent for; this was at Shippen and Third Streets; we met there by accident, just after dark, I was in liquor, but am certain I met him; can't say if it was between eight and nine o'clock; can't say when I began to drink; it was in the morning; I went to bed at eleven o'clock that night; you want me to tell a lie; I want to tell the truth; it was after dark; went to Nolen's house, in Second Street, between Lombard and South; I believe I went there from Third and Shippen; went to sleep in a chair; went from there to John Scott's, in Shippen Street, between Third and Fourth; don't know where I got my supper; was too much intoxicated; I last saw Tate about two or three hours ago, standing at the corner of Second and South Streets, talking about going down the bay; he told me I was wanted as a witness; I say on my oath I don't know who Mr. O'Neill is; I may have been in his office, but I don't remember it; did not join him with Mr. Carroll last evening; cannot say when I saw Tate.

To *Mr. Hagert.* The *Police*

*Gazette* was the only paper Dunn read; saw the heading of the article in the *Inquirer*; it was, "The Murder of Mary Mohrman"; got my information from its being in two papers.

There was a long pause in the trial here, owing to the absence of witnesses for the defense.

JUDGE LUDLOW urged the counsel to proceed.

*Mr. Brewster* said they were making every effort to produce the witnesses, and could produce them by six o'clock.

JUDGE LUDLOW. Then we will sit until twelve o'clock, to-night, in order that you may finish your case. I neglected to ask whether subpoenas had been issued for these witnesses, so that the process of the court may be properly used to bring them in and justify this delay.

*Mr. Brewster.* I am instructed to say that we will be able to bring the witnesses in between this and six o'clock; we will do the best we can. Fugitive notes were sent to us yesterday afternoon; we could not know from whom, nor ascertain the truth of their statements at that time. We have made every effort to produce the witnesses referred to in these communications, and will say to the Court, that, if we do not produce them by six o'clock, we will leave the matter to your Honor's ruling.

JUDGE LUDLOW. These witnesses may come in by six o'clock?

*Mr. Brewster.* Yes, sir.

JUDGE LUDLOW. Then the court will remain in session until that time.

The Judges retired to their consulting room. A few minutes before six o'clock they resumed their seats.

*Mr. Brewster* said he understood that the witness Peirce had been detained by the officer on the stairs, and he desired to have him brought in.

JUDGE LUDLOW. Send for him, Mr. Crier.

*Daniel Peirce.* Know Michael Dunn; knew him in prison; he came there in August 1868; he stayed with me till February, 1869; had no conversation with him in relation to the Mary Mohrman case, although it was talked about; he knew of it, and I knew of it; he got an account of it from the paper, the *Police*

*Gazette* and other papers; I saw him reading the *Police Gazette*; it came from different localities and parties; I was there serving out two years for larceny; served out my term.

*Cross-examined.* My name is Daniel Peirce; did not say to any one my name was Scanlon; I think I did sign my name to a bail-bond before Alderman Allison by the name of Scanlon; I was intoxicated at the time; I was in cell B; Dunn got the *Police Gazette* from letter B, I think; a man named Carroll was there; I don't know where he got the papers; there were one or two *Police Gazettes*, I am sure, containing the account of this murder; Carroll sent it up to me; the runner said he sent it; don't recollect any writing on it; Tate's name, or any other don't recollect; the runner was a colored man; it was in October, 1868, I think; cannot tell what I did with the paper; can't tell how long I had it; think there was another paper containing an account of this matter; can't say what; did not read it loud; can't say if Dunn read it aloud; don't know that I had a conversation with Dunn about Mary Mohrman's case; I live at No. 316 Bainbridge Street, formerly Shippen Street; Tate came to subpoena me; was waiting for Wm. Murphy, a young man; he was a bartender for Mr. Oliver;

don't know what business Oliver carried on; did not wish to mention the man's name; have not seen him since I came out of the County Prison; he asked me to take a walk; did not tell me what for; said we ought to go out to the court; I have read part of Dunn's testimony here; don't remember that part in which he said he had friends, money, and influence; was waiting for Murphy this morning; I was subpoenaed when I got to Sixth and Walnut Streets; I got out of Moyamensing June fifteenth, 1870; lived with my brother; that is the first time I was in; was convicted on two larcenies; was in letter B, south side; Dunn and I were in letter U when the paper was received; know Michael Dowling; have not talked to him on this subject.

*Michael Dowling.* Was notified to be here last night; did not come voluntarily; it is no interest to me; had no part in it until I came to court; asked the last witness why he had not told the truth; he knows more if he would say it; was at Seventh and Shippen Streets; met Tate and Farmer to look for Murhardt; saw no one else there; don't know what time it was; it was after the court met; I think after the noon recess; I did not say to anybody there that there was a hundred dollars in the case.

### THE ARGUMENTS OF COUNSEL.

*November 15.*

*Mr. Brewster* began his argument, discussing the principles of law applicable to the principal feature in this case—the confession—for the purpose of showing that it should

not be received by the jury. He referred to the fact that the English statutes as early as the fourteenth century forbid the use of these means—confessions drawn through the process developed in this case; he contended that, while not expressly forbidden in this State, the theory of the law forbids it. Authorities were referred to, showing the danger of taking confessions, voluntary or otherwise, as evidence of guilt. Confessions are received by courts, but always with suspicion. Upon this branch of the argument, *Mr. Brewster* urged that the confession was “hearsay,” and the jury could only receive it as Dunn gave it, not knowing what he omitted or what he added; not knowing whether he reported correctly the words of Hanlon in making the alleged statement.

Having disposed of the principles of the law with numerous quotations from the Reports, *Mr. Brewster* took up the evidence. First, John Hanlon is accused of this offense by Michael Dunn, and Michael Dunn is sought to be corroborated. Would any juror convict John Hanlon of any charge, no matter how trivial, upon such testimony? When Hanlon was put with Dunn, it was natural for Hanlon to tell him the latest horror—the murder; and he might have told every words as alleged by Dunn, without the all-important addition, “I am the man.” Hanlon was only repeating what others knew. The mere proof of facts known long before is not corroboration of Dunn. Caroline Dinglacker’s testimony, called to corroborate Dunn, is not corroborated by a living witness, and what she does now say is entirely different from what she said before the Coroner, when she failed to tell that she saw the man go up the alley. If that was true why not tell it then? She tells the story like a well-prepared lesson, as it is, not because her mind is impure, but because it is weak naturally, for she is but nine years of age. In regard to the other corroboration, it was contended that, while a man was seen carrying a bundle, there is no evidence that it was John Hanlon, and yet some of the witnesses who saw the man, knew John Hanlon, and they do not identify him here.

*District Attorney Sheppard* (to the jury). I am here to perform my duty without any reference to the seductions of flattery or the threats of others. I shall, however, discharge my whole duty in the case, as I feel the public demand it. In what I shall say, however, I shall confine myself to the facts and the facts alone, without reference to any attempt at oratory.

Now let us begin at the beginning. Was there such a child as Mary Mohrman?—for there have been attempts made to raise so many doubts that possibly they would have you to believe that no such child existed. It is certain that when she was last seen she was in the neighborhood of John Hanlon's house, and it was there alongside of that corner and in that alley that Mary Mohrman was missed and carried away. There is evidence in this case to show that she was carried up that alley by John Hanlon. Now about Caroline Dinglacker, of whom so much has been said. After she had given her truthful story she was subjected to a torturing cross-examination, occupying over two hours and a half; but in the case of a full grown man it was different with my friends; they feared to attempt to subject him to so terrible an ordeal. It seemed as though the transaction was to be completed by torturing a child after one had been murdered. In the examination before the Coroner, it is difficult to say which of it is in the Coroner's language and which is the testimony of Caroline Dinglacker as the testimony as recorded was conversational. These rough notes of the Coroner rather represent the judgment of the Coroner instead of her testimony, for he did not even get her name correctly. Observe, gentlemen, it is not her own testimony alone, but that it has a bearing upon Michael Dunn's evidence, and herein is the reason why they would have you reject the little Dinglacker girl's testimony. She said that he wore light clothes and a striped shirt, and during the whole time I was troubled as to how she made that out. That was not accounted for by John Hanlon in his confession, and was not made up by detectives. But when the defense



opened their case, too, they said that he wore a striped shirt, and herein the little girl was fully corroborated.

*District Attorney Sheppard* continued his argument at some length, reviewing the evidence for the Commonwealth and defense, and closed with a powerful appeal for the jury to render a verdict of guilty.

### THE JUDGE'S CHARGE.

**JUDGE LUDLOW.** Gentlemen of the Jury. After many days of patient labor, we approach the end of this trial. To the Court is assigned the duty of explaining to you the law, and while we may comment upon the evidence, you, and you alone, can decide upon the guilt or innocence of the prisoner. In view of the vital importance of the issue presented now and here, we beg that you will, as conscientious men, act with perfect impartiality, and, being guided by the law and the evidence, that your conclusion, whatever it may be, will commend itself not only to your own sense of justice and right, but also to the severer judgment of that Being before whose bar we must each stand hereafter to be judged. Acting upon these principles, you can safely proceed to the discharge of your duty, regardless of consequences.

The bill of indictment charges the prisoner with having committed the crime of murder. It contains two counts; the first charges a wilful, deliberate, and premeditated murder, and the second, a murder committed in the perpetration of a rape. Our statute declares that: "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing; or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree. You will observe that, under our law, any "wilful, deliberate or premeditated killing" constitutes the offense of murder of the first degree; and also a killing committed in



the attempt to perpetrate or the actual perpetration of the crime of rape. Hereafter your attention will be called to a distinction which depends upon the language of the statute. Before we proceed further it is proper to refer to the general law in relation to homicide, and then we will be able to understand the language of our Act of Assembly.

All homicides are not felonious. An officer of justice who kills a man in the discharge of the duties of his office, as when the sheriff executes a criminal, perpetrates a homicide, but he commits no crime, for it is a justifiable act. The man who in self-defense, and under circumstances clearly warranting it, slays another, is not a criminal, for the act is a necessary one, and the homicide is excusable. Where a life is taken under circumstances clearly indicating malice, the offense at common law is a felony of the highest grade—in murder. To this day, and in this Commonwealth, a malicious killing is murder. Our statute, however, modifies the rigor of the common law, and establishes two grades of murder, to-wit: murder of the first, and murder of the second degree. To establish murder of the first degree, something more than malice must be present; it must in ordinary cases be coupled with an intent to take life, and the killing must have taken place in consequence of the “wilful, deliberate, and premeditated” act of the prisoner. If the intent to take life does not exist, and is not clearly established by the Commonwealth, and if the act was not wilful, deliberate, and premeditated, the offense is not murder of the first degree. If the killing occurred from the malicious intent of the prisoner to do great bodily harm, the offense would be murder in the second degree. We have said that in ordinary cases the intent to take life must be proved, together with the fact that the killing was the “wilful, deliberate, and premeditated” act of the prisoner, in order to constitute the offense of murder in the first degree; but in a case in which a murder is said to have been committed in the perpetration of rape, the specific intent to take life need not appear, but the death must, in the language of the present Chief Justice of the State, be

“clearly shown by the prosecution to have occurred in the performance of such acts as should establish the independent, substantive crime.” *Kelly vs. Commonwealth*, 1 Grant, 487.

Upon this branch of the case two questions therefore present themselves under this bill of indictment: First. Was the killing “wilful, deliberate, and premeditated,” and was it malicious and coupled with an intent to take life? If so, whoever committed it would be guilty of murder in the first degree. Second. Did the killing take place in the perpetration of the crime of rape, manifested by acts, clearly indicating the commission of that crime, and without regard to the intent to take life? If so the crime would be murder of the first degree.

Under the first count in this bill it is in the power of the jury to convict of murder of the first degree without regard to the fact whether a rape was or was not committed, but to do so they must be clearly satisfied that the act of the guilty agent, resulting in the death of his victim, was a voluntary one; that it was well considered before hand, and being thus a free act, thought of in advance, was coolly perpetrated with a malicious design to take life. Under the second count in this bill the prosecution must establish by clear testimony the fact that the crime of rape was perpetrated, and that in the perpetration thereof, the deceased lost her life, and that without regard to the intent of the prisoner. It is all-important upon this second count for you, gentlemen, to understand what the crime of rape is under our law.

Our penal code declares, “If any person shall have unlawful carnal knowledge of a woman, forcibly and against her will; or who being of the age of fourteen years and upwards shall unlawfully and carnally know and abuse any woman child under the age of ten years, with or without her consent, such person shall be adjudged guilty of felonious rape.” Another section of our code declares that it shall be necessary in the case of an alleged rape upon the person of a child under ten years of age, to establish carnal knowledge by proof of “penetration only.” It is necessary,

therefore, in this case, for the jury to believe that the person of a child under ten years of age was unlawfully and carnally penetrated by a person above the age of fourteen years, and this without regard to whether she did or did not give her consent, in order to come to the conclusion that that particular crime called in the statute "rape," was committed. If in the perpetration of such a crime upon such a person, the victim died, the crime is murder of the first degree.

We said to you that our statute created a degree of homicide called murder in the second degree, which you will remember was the malicious killing of another, not perpetrated wilfully, deliberately, and premeditatedly, and with intent to take life, or in the perpetration or attempt to perpetrate one of the felonies named in the statute; for, after designating these, our law says: "All other kinds of murder shall be deemed murder of the second degree." We call your attention again to this degree of crime, as well as to the offense named voluntary manslaughter (which is the unlawful killing of another without malice on a sudden quarrel, or in the heat of passion), not because we suppose the jury will, with the facts now in evidence, believe for a moment that it does not at all point to the commission by some one of a capital offense, to-wit: murder in the first degree; but because our Supreme tribunal has declared that a jury may, by law, find any degree of crime, they please, and are alone responsible for the view they take of any evidence in a cause.

Having thus referred to the law, it is now our duty to direct your attention to a number of questions which arise in the cause, and to refer to the evidence together with the principles by which you ought to be governed in determining its application, weight, and reliability.

To sustain a conviction, it ought to appear that the person named in the indictment as the victim of criminal violence is in fact dead, that she came to her death by violence, inflicted either maliciously, with a wilful, deliberate, and premeditated design to take life, which is murder in the first degree. Or, in the perpetration of the crime technically

called rape, which is also murder in the first degree. Or, maliciously and with intent to do great bodily harm, which is murder in the second degree. Or, without malice, in hot blood, on sufficient provocation, or in a quarrel, which is manslaughter.

The following questions must, therefore, be answered in this case:

First. In point of fact, is Mary Mohrman dead? Second. Did she die a violent death? If so, what was its nature? Third. Did the prisoner at the bar destroy her life in manner and form as he stands indicted?

The first question can, if you regard the evidence, easily be answered, for it has not been disputed that this child lost her life in September of the year 1868. That, however, we may be guided alone by the proof in the cause, we refer to the testimony of Dr. Shapleigh, to the identification by Mr. Fluck and the mother of the deceased, as also to the evidence of a number of other witnesses produced by the Commonwealth upon this point.

Having thus established the fact of the death, the second question arises, "Did she die a violent death? And if so, what was its nature?" Dr. Shapleigh's testimony discloses the fact that the person of this child was most shockingly mutilated; upper part of chest and neck, and under each ear the body bore evidences of violence; upon the top of her head were two wounds, and also one upon the back of the head, while her private parts had been torn and lacerated. The testimony of the mother is that she was but a little over six years of age; by other witnesses was declared to be at the utmost not more than three-and-a-half feet in height. Can this be a case of death by accident or suicide? It is for the jury to determine: and if it would be impossible, in your opinion, to come to any such conclusion, then what was the nature of the violence which resulted in the death of a child of such tender years? Dr. Shapleigh declares that the immediate cause of death was strangulation; but we must look a little further, and determine whether any circumstances of

a peculiar nature accompanied the act. The evidence is that the child was seen alive at an early hour on Sunday evening; that she was not again discovered until she was found dead at the edge of a pool of water, on the morning of September 8th, 1868. When found her body presented a melancholy spectacle, with marks of violence upon her throat, chest, ears, and the top of her head, and with blood upon her limbs and about her private parts. Looking now simply to the manner of her death, without regard to the guilt or innocence of the prisoner, it is for the jury to say whether this strangulation was incident to, and a part of, the act of some person engaged in the perpetration of a rape; because if it was, although the actor did not intend to take life, the law makes the offense murder in the first degree, if the jury believe that in point of fact a rape was perpetrated. If, however, you come to the conclusion that, although a rape did take place, the child afterwards died by an act of violence, independent of rape, the offense would only be murder in the first degree if the guilty agent acted maliciously, with an intent to take life, and wilfully, deliberately, and with premeditation.

Taking into consideration the testimony in this cause which relates exclusively to the condition of Mary Mohrman's body when found, and viewing, especially, the evidence of the Coroner's physician of the condition of the private parts, as developed by post mortem examination, can the jury pause in determining the exact legal nature and cause of this death? Was it violent and the result of force used in perpetrating a rape? You have a right alone to determine its nature, and in doing so we know you will be governed by those well-known rules of common sense, sanctioned by law which permit you to draw conclusions of fact from causes established by the uncontradicted evidence in the cause.

If you determine that the deceased child lost her life by violence, the greatest question in the cause remains yet to be answered; it is this: Did the prisoner take the life of Mary

Mohrman? Before proceeding to speak of the evidence submitted upon this branch of the cause we ought to refer to the peculiar nature of the most vital part of it, to-wit: the alleged confession of the prisoner.

Verbal confessions are at all times to be received with great caution; "for," says a learned writer, "besides the danger of mistake from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make untrue confession." Greenleaf, sec. 214. Confessions are also of two kinds, judicial and extra-judicial. Judicial confessions are those which are made before the magistrate, or in court, in due course of legal proceedings. Extra-judicial confessions are those which are made elsewhere than before a magistrate, or in court. Of this nature is the alleged confession in evidence in this cause. It is also to be observed that by our law, an extra-judicial confession, uncorroborated by any other proof of what is called the *corpus delicti*; that is, the actual offense committed—as that the person alleged to be murdered is in fact dead—is insufficient for the conviction of the prisoner.

In this case, the death of Mary Mohrman seems, though you must determine the fact, to be admitted, or established by competent testimony. As, however, the confession in this case was made, if made at all, by the prisoner to a person who was a fellow prisoner, and who admits that he had committed here, and elsewhere, numerous crimes, we think it our duty in this case to say, that this confession ought to be corroborated by circumstances in the cause which are themselves to be proved by competent witnesses, are consistent with each other, and with the main fact sought to be established, to-wit: the truth of the confession in evidence. The competency of the witness was decided by the Court; his credibility is for you.

Bearing in mind these principles, we will now proceed

to examine the evidence, in so far as it relates to the guilt or innocence of this prisoner.

In order to give you a correct view of the premises, in which it is alleged by the Commonwealth this murder was committed, as well as to present to the eye a representation of the streets of the neighborhood, together with the lot and pond on which it is said the body was found, the District Attorneys have produced in evidence plans of the residence of Hanlon, the adjoining alley, privies, gates, streets, lot, and pond. Your attention has already been directed to the house in which Hanlon lived; you remember the alley at the side of the house, its gate, and the position of the house and privy. The house had three stories, with a back kitchen and cellar. The room down stairs, first story, was occupied by Hanlon as a barber-shop; had, of course, a front door, a rear door in a partition which had been erected at the end of the room. Passing out of the shop you entered the space enclosed by the partition; you could go up stairs by a stairway, or into the cellar by another stairs, or into the kitchen through a door. The house up stairs was divided into four rooms—two on each story; the cellar ran under the house.

The question of the exact time at which the deceased lost her life becomes one of importance, and to the evidence submitted on that point we shall first direct your attention. Officer Fluck declares that he saw Mary alive for the last time, between three and four o'clock on the afternoon of Sunday, the sixth day of September, A. D. 1868. She was missed, he says, at eight o'clock p. m. Anna Mohrman (a sister of the deceased) says her sister was with her that evening, on Diamond street, on the step. Mary and Mrs. Dinglacker's little girl went with the baby, Mrs. Bush's baby, around into Fifth street, with the coach, on the same side of the street upon which Mr. Hanlon's house is situated. Emma Bush testifies that the last she saw of Mary she was seated on Hagenswiller's steps; spoke to Hanlon as she passed by a group; she fixes the time at quarter to eight, just before church let out. Caroline Dinglacker met with deceased

at the steps, and went with her around into and down Fifth street with the coach. Martha Conathy saw Mary that evening standing at a fence, Deal's fence, talking to a man, but does not fix with precision the time, though she says it was after "supper, just about dark;" her brother went to bed at eight, and she about nine o'clock. The mother of this child, Mrs. Sophia Mohrman, saw her daughter last at a quarter past seven o'clock, on her way to church. "Mary left me at the corner of Orkney and Diamond streets." She returned, she thinks, at from half past eight p. m. to twenty minutes to nine o'clock; her child was not at home, and her anxieties being aroused, she proceeded to make a search for her, which was continued to an early hour in the morning. This witness went around into Fifth street, and the neighbors informed her that Mary was there ten or twenty minutes ago. From this evidence it may be contended that the child was lost and had disappeared between the hours of half past seven to eight p. m. and twenty minutes to nine on that evening. On the question of the time we shall refer hereafter to the confession.

When was the body discovered? All the testimony seems to concur in fixing Tuesday, the eighth day of September, 1868, at an early hour of the morning, as the day and time the discovery of the dead body was made. The place also seems to be settled, for all the witnesses say the body was found at the edge of a pool of water in the open lot.

When was it placed there? Anna Emory testifies that she came from 505 Dauphin street, across the lot, at twenty minutes after five on Tuesday morning, and discovered the body. Samuel Bilger came down Tyson street and crossed to Susquehanna avenue at half past three a. m. on Tuesday morning; he did not see the body, although he passed within eight or ten feet of the spot where it was found. George Quester crossed the lot at a quarter before four a. m., within two yards of the pool, and the child was not there then. After the discovery of the body by Anna Emory, or about that time, a number of other witnesses testify to the time



as Fifth and Diamond streets; then asked Emma Bush to show him the way to Fourth and Dauphin. Emma says, "A man at the corner of Fifth and Diamond asked me if I could not go with him; I did not know him." "I went down Fifth to our house; John Hanlon was sitting on his own step; he asked me if I knew where Dauphin street was; I said yes." By the confession, Hanlon said, as stated by the witness: "I got her in the alley at the time Emma Bush was with them, but the other girl was there and saw me lead Mary Mohrman by the hand into the alley; the next day she said it was a big man with whiskers on took her from me, and that is why I stood my ground." Caroline Dinklacker says: "I was with Mary at Hagensweiler's; had a coach with Mrs. Bush's baby; stopped by Hanlon's pole; a man took her by the hand up the alley; I called her two or three times, and she did not answer, and she did not come back." She took the coach to Bush's.

Just here we pause to say that the vital importance of this little girl's testimony may explain why she was subjected to a tedious and lengthy cross-examination; the Court did not and would not interfere, and the result of that examination is before you, so that you may judge of the weight which is to be given to the child's testimony. The learned counsel for the prisoner measured the extent of the cross-examination by the momentous issue involved, and with their conscientious discharge of proper duty, no man has a legal right to interfere. Look at this child's evidence as a whole, weigh it with reference to its material points, as contrasted with minor details, and give to it that consideration which it legally deserves. We shall refer to it again hereafter.

But to proceed. The witness also says that she went across the street, "looked over at Hanlon's, and the barber-shop door was standing open, and it was dark." When she got into her own home she saw a man go up the alley. Did she see two men? "The man I saw, when I looked out of the window, had a dark straw hat." "The man that spoke had dark clothes, a striped shirt, and a cap on; he had

whiskers, too." Martha Conathy saw Mary talking to a man at Diehl's fence, standing at the corner; had a cap and dark clothes, but did not know him. Alderman Field stood at the corner of Fifth and Diamond, and went into his house at a quarter before eight o'clock; he saw some person before he went in on Hanlon's steps; came out in fifteen or twenty minutes and saw nobody. He thought the person he saw was a man.

It is said that the confession has received further corroboration. Let us examine again the testimony. "In a minute or two," said the prisoner to the witness, Dunn, "I got her in the alley; a man came through the alley at this time; I had her standing up against a fence that separates the yard belonging to the cigar store from the alley; I did my best not to let the man see her; he hit up against me in passing;" "he told me," says Dunn, "he did not know this man; he was d—n sure he could not swear to him; the man went through the alley somewhere." John Shriver is called by the Commonwealth to corroborate this statement. He says that at about twenty minutes to nine p. m. he went "into the alley about fifteen or eighteen feet, and saw a man; I did not know what he was doing; he was standing still between two privies, one his own, the other Diehl's; he was alone; did not speak to him; it was dark; I heard of the loss half an hour after; he was standing in this position (head down and feet apart); he was about five feet high; clothing looked dark. On cross-examination this witness said that he "saw him (the man) when one or two steps from him, when I entered;" "from where I saw him it is fifteen feet to where you enter my yard; when two steps from him I looked over my shoulder." He mentioned the circumstance some fourteen days or more after, and that he spoke to his children about it some four or five weeks after the death of Mary. It is for the jury to say how far upon this point this witness corroborates Dunn's statement of Hanlon's confession. It is evident that he did not know the man; but does this witness corroborate the statement, and thus add to its weight? That

question you alone can determine. In speaking of his visit to the upper part of his house after the alleged murder (the confession stating that by half-past eight he had gone upstairs) the prisoner is made by Dunn to say: "I had hardly got upstairs until Mary Mohrman's mother came in front of my house looking for her." Mrs. Mohrman, in her evidence, says: "I passed Hanlon's house in search of my daughter at twenty minutes to or a quarter before nine p. m."

The confession describes the efforts made by the prisoner to dispose of the body, and the Commonwealth endeavor to corroborate the truth of the statement by proof of the appearance of a man at certain periods of the early morning. Let us look at the evidence upon this point a little more in detail. By the confession it appears that when the "coast was clear," by one statement, he "got the body, went out the back way, turned to my left, crossed over Diamond; then around up Diamond street as far as Sixth, turned up Sixth, turned again and went into Dauphin street; then turned again and saw a man on opposite side; got behind a barn, which was a wooden frame building; I don't think the man saw me; threw body on a spare lot" then he crossed over (says the witness) to either Fifth or Sixth street and Susquehanna avenue; "a lager-beer woman saw me; came down on her side of the street; saw a light in a window and some one standing; got away home as soon as I could; it was now after four o'clock." Another statement made to witness was as follows: "I got the body and put it lengthways in front of me, and fastened the coat I had on around it and me; went out the back way, turned to my left, crossed over to Diamond street, then I turned up Diamond street as far as Sixth, then went into Dauphin street, then turned again, saw a man on the opposite side of the street, got behind a barn on the opposite side of the street, which was a wooden frame building; all was clear until I was crossing Susquehanna avenue, and there I met Charley Mass; I had on a pair of light plush slippers; the way I was dressed and fixed up thought Charley did not know me; I knew he was going to

the stable to feed his horse so as to get to market to buy things for his mother, who keeps a grocery store; when I met Mass I had the body in my arms; I went on to Dauphin street, and got to where I put down the body in a pond of water that was on the spare lot; I hardly had it out of my arms until I see a man coming, then I run and got behind the barn; . . . stayed there a minute or two, then I went down to Fifth and Susquehanna avenue, and a lager-beer woman seen me, she was opening her shutters from the inside; I held my head down and threw up my arms." To corroborate the essential part of this statement the Commonwealth called Alfred Walton, who lived at Susquehanna avenue and Fifth street, opposite the lot on which the body was found. He states that early on Monday succeeding the murder, about one o'clock, he saw a man standing under the awning, or two feet from it; then appeared on southeast corner (Glick's); he did not stand, but looked excitedly around, then went down the south side of the avenue; he then stood under a shed at corner of the avenue, and looked about, and went down Orkney street; next he saw of him was in Fifth, below Susquehanna avenue, coming out of Orkney street. The witness then went down into his store, struck a match, saw it was two o'clock. On his return he saw nothing further. The man was about five feet seven inches high, slightly built, dark clothes, hat or cap pulled over his eyes, and collar turned up, and made no noise. Another witness, George Custer, was the watchman at the Fourth and Eighth street passenger railroad depot; he was on duty at an early hour on the morning of the eighth of September; he stood at the corner of the office, on the lower side of Diamond street; it was early, before the hostlers had arrived; it was twenty minutes before or after three o'clock, he cannot say which, when a man was seen by him to cross Diamond street, coming, not going across; heard no footsteps; going up Germantown road to the bend of Sixth street, he lost sight of him at that point. This man had a sort of bundle thrown over his shoulders, like a bag of wheat or feed; his walk was slow, his size medium. An hour or

so afterwards the body was found. Charles Mass got up about three o'clock; was going to the stable, on the opposite side of Germantown road, near Diamond street. He saw a man, walking fast, carrying something in his arms; made no noise in walking. When this witness got to the square he looked toward him; saw him carrying something in his arms, bent over, as though carrying something weighty; had on light pants; looked dark about the body. He met this man coming up Sixth street toward Susquehanna avenue, on the east side, six or eight doors below Susquehanna avenue; he watched him till he came to the curb of the avenue, and then lost sight of him. This time the witness fixed as between half-past three and four o'clock. He did not know the man. Another witness, John N. Giverson, was going to work, early in the morning, between three and four o'clock, nearer four, he says; he saw a man twenty-five feet ahead of him; he (witness) had crossed Diamond street on the east side, near Cornell's cigar store; he appeared to be carrying something across his left breast, walking sharp, apparently bare-footed; he went straight up to Susquehanna avenue, on east side of Sixth street; the witness walked at an angle to the old foundry; saw Mass standing in front of his house; lost sight of the man about twenty paces above Susquehanna avenue; he did not see his face, for his back was turned, though the witness thought the man was built slenderly, and was about five feet five inches in height.

To trace the route by which this man returned, the Commonwealth called William Quester, who states that he had been to a watermelon party; left the house at twenty minutes to four; crossed the lot at ten minutes to four; crossed from Sixth and Susquehanna avenue to Fifth street; went along Susquehanna avenue towards Fifth; down Susquehanna avenue to Fifth; then went cat-a-cornered across Fifth street from northwest to southeast corner of Susquehanna avenue. This witness saw a man as he stood at the edge of the path which crosses the lot. As he stepped on Sixth street he saw a man pretty close to the old house, and he walked around

and went to the north side. When Quester reached Fifth and Susquehanna avenue he started on a run; the man at first sight was fifty yards ahead of him, and he saw no more of him. Emelina Welscher, the German woman, who lives at the southeast corner of Fifth and Susquehanna avenue, and keeps a lager beer saloon, went to bed and left her window open. She got up and went to open her shutters, or shut down her window, being cold. As she reached the window she says she saw a man coming from Susquehanna avenue; he walked fast, and was going toward Fifth street. She saw him first on the brickyard side, then on her own side and pavement. He went down fifth street. "He run down Fifth on my side," says Mrs. Welscher, though on cross-examination she added he did not run, he walked fast. She did not see his face, and did not take particular notice of him. This witness cannot fix the precise time, but thinks it was towards morning. She went to bed again the second time, and when she got up it was six o'clock. In answer to prisoner's counsel she said it was about four o'clock. She did not hear the man until she saw him. Other and minor details of evidence of corroboration have been offered by the Commonwealth, such as that Hanlon sometimes wore slippers; that officers were detailed to examine into the case at the time the murder was committed; and that men were arrested generally who had whiskers and dark clothes; that a subscription was taken for Mrs. Mohrman, though it does not appear that Hanlon subscribed, and that he was present to view the body of the child on Wednesday; that the prisoner on being arrested, gave the name of Charles H. Harris; but as we do not pretend to review every particular fact in the cause, we will content ourselves by asking you to refresh your memories by reflection as to any point which may have escaped our notice. In looking at this confession, with the evidence submitted in corroboration of it (the most material part of which we have alone referred to), you ought, in the first place to determine what was the position of Dunn at the time he says it was made to him—how long

had he been in prison? When did he first know of Hanlon, or hear or know of any fact touching his (the prisoner's) case, and were they (the facts of the murder) generally known? In weighing the credibility of Dunn's evidence, everything depends upon a satisfactory answer being made to these questions. If the witness never knew Hanlon, had never heard of the facts of this case until informed by him, and by him alone, the corroborative testimony will doubtless have more weight with you than it can possibly have if Dunn by any possibility, in any way, did or could have informed himself as to the specific facts of the case.

Dunn says he was convicted and sent to prison in August, 1868; that he never knew Hanlon until December 29th, 1869, and that before that time he knew nothing whatever about him or this case, and that the interviews which took place during the day continued from time to time between the 29th of December, 1869, and March 1st, 1870, when the prisoner was removed from his cell. Alderman Heins, Detectives Taggart, Smith, and Tryon, and the assistant superintendent of the prison, each say that they communicated nothing to the witness, Dunn. Mr. Perkins declares that no one but the detectives had access to Dunn, to his knowledge; that no newspapers, except religious ones, are permitted to be received by convicts, and those only when given by the Prison Society, while to his knowledge no communications (which are opened and examined either in going out or coming into prison) were ever made of the disappearance and death of Mary Mohrman. The Commonwealth goes further, and offers testimony to the point that as to certain witnesses, among them William Quester and John M. Giverson, the officers knew nothing of their testimony until within a few days past, and that prior to the confession they did not know even of the existence of such a fact as this, to wit: the appearance and disappearance of a man behind the old barn.

We shall hereafter notice, in its proper place, the evidence produced to prove that Dunn had knowledge of the murder. And now, looking at the alleged confession, with the evidence

which has been produced to corroborate it, together with all the other testimony produced by the Commonwealth; remembering the very able arguments of the prisoner's counsel, directly to the reliability of the evidence produced in corroboration of the confession, and the want, in their opinion, of such evidence, can you say that the prisoner is not fairly called upon to make defense? If so, your labor would end at this point; but if not, then you would naturally turn to the testimony by which he seeks, either to destroy the case of the Commonwealth altogether, or to render it one of doubtful nature, in which event he would be entitled to an acquittal.

Let us then examine the nature of the defense and the evidence by which it is supported. That defense is of a five-fold nature: First. The prisoner seeks to establish a defense in the nature of an alibi. Second. A second branch of this defense consists in an effort to prove the confession false, by testimony intended to establish substantive facts inconsistent with the truth of the confession. Third. A third defense is based upon contradictions in the testimony of Caroline Dinglacker, established by the production of the notes of evidence taken before the Coroner. Fourth. A fourth defense consists in the production of testimony calculated to lead to the belief that this murder, if established, was committed by a person not the prisoner now on trial. Fifth. The fifth and last point of defense is based upon the evidence of witnesses, produced to prove that Dunn is not to be believed, because he knew facts in relation to the murder before he saw Hanlon, and that he (Dunn) expected a pardon.

[The evidence upon all these points was carefully reviewed in detail by the learned Judge, who in conclusion said:]

We have thus commented upon the most material parts of the evidence in this cause. We cannot hope that we have specified every particular item, and we therefore request you to examine anxiously the whole testimony. Weigh it candidly and impartially. Conscientiously exercise your best judgment, and endeavor to come to a satisfactory conclusion. If



a reasonable doubt exists, give the prisoner the benefit of it. This doubt must, however, be reasonable, such an one as would lead a man of common sense, if he were dealing with the ordinary business of life, to pause before coming to a conclusion. If, upon a candid and conscientious review of the whole testimony in this case, such a doubt arises, it operates to acquit.

And now the fate of the prisoner is in your hands. If his guilt has been legally established, say so firmly and fix the grade or degree of the crime. If, however, the Commonwealth has failed to establish it beyond reasonable doubt, then, as her magistrates, we join in that prayer, which, at the supreme moment of peril a humane government offers, as she directs her official solemnly to pause, and in reply to the plea of the prisoner to exclaim, "May God send you a safe deliverance."

The *Jury*, at half-past eight o'clock, retired. Not having agreed up to half-past ten, the court was adjourned until ten o'clock Wednesday morning, November 16th.

*November 17.*

The *Jury* not having agreed on Wednesday the court was again adjourned until today.

This morning, the eighteenth day since the trial, was marked by an immense crowd in the court room, every inch of available space being occupied, and hundreds being turned from the doors after the room was filled.

A few minutes after ten o'clock, the *Jurors* came into court.

*Mr. Galton* (the clerk). Gentlemen, have you agreed upon a verdict?

*The Foreman*. Yes.

The jurors were directed to stand up. The same order was given to the prisoner.

*The Clerk*. Prisoner, look upon the jury—jurors, look upon the prisoner. Gentlemen, how say you, do you find

John Hanlon, alias Charles Hanlon, alias Charles E. Harris, the prisoner at the bar, guilty of the felony of murder whereof he stands indicted, and in the manner and form as he stands indicted, or not guilty?

*The Foreman.* Guilty.

*The Clerk.* Of what degree?

*The Foreman.* The first degree!

*Mr. Brewster* asked that the jury be polled, and to the question put to each juror the answer came, "Guilty of murder in the first degree."<sup>8</sup>

JUDGE LUDLOW. Gentlemen of the Jury: I am about to discharge you from further attendance upon this court. Before doing so I desire to return to you the thanks both of my brother Peirce and myself for the careful, attentive and judicious consideration of this case.

### THE SENTENCE.

*December 10.*

*Mr. Brewster* having filed a motion for a new trial, it was today overruled by JUDGE LUDLOW, whereupon District Attorney *Sheppard* moved that sentence be pronounced.

JUDGE LUDLOW. John Hanlon, have you anything to say why sentence of death should not be pronounced?

*Hanlon.* I have, and with the privilege of a book, I will introduce it.

A Bible was passed to him by *Mr. Brewster*.

*Hanlon.* By this book I will now introduce to your lordships what I have to say, and show you what has been done,

<sup>8</sup> During their deliberations the brother of one of the jurors, Mr. Winpenny, died. The family kept the body as long as possible, and the funeral took place only on the day before the verdict. Mr. Winpenny did not know the fact until he was discharged—all communication with the jurors being forbidden, and all newspapers being excluded. In regard to the delay in making up a verdict, it was said that it was not due to any serious disagreement, but to a conscientious desire not to decide a question of such great moment without serious and careful consideration of the entire case.

and prove how my life has been sworn away by perjured witnesses. Oh, look at George Smith! How did he and Howard Perkins treat me! How was I beset by these men, who tried to draw me into a trap? On the sixth of January, George Smith came into my cell, and what did he say? "John, how are you? I'll tell you who I am. I might pass off for an inspector, but I won't. I am George Smith. Do you know me?" Said I: "No, I don't, nor do I want to know you." He looked at an Episcopal bible that is in every man's cell, and said: "What book is that, John?" I said: "One you'd better take with you and make good use of." He said: "No, John, you'd better make use of it." He asked me about making shoes, and asked me what kind of a partner I had, and said: "I know as much about him as you do." He said: "Do you think I'd hold such a book as this in my hand and say I didn't know a man I did know?" Oh, George Smith! He was seeking my ruin. What were the oranges, the pipe and tobacco for? Oh! the perjurer to swear away my life for fifteen hundred dollars, as Josh Taggart said, and Howard Perkins! And I shall die by murder, leaving behind me a heart-broken mother. I may say it has sent her to her grave. And my poor wife, what did she know about the slang of Botany Bay? She could say nothing. And now I have one request to make, your lordship, and it's a dying man's request. If ever another such case should come to light, lay before the jury John Hanlon's last words, and let no more blood be spilt by perjury.

When *Hanlon* closed he kissed the Bible, as if to give the sanctity of an oath to his words.

JUDGE LUDLOW. Prisoner at the Bar. If you ask by what authority we act, learn that we, as your judges, represent here to-day the sovereignty of this Commonwealth. Through us she speaks to you. We do not desire to protract this sad scene further than to call upon you to measure the depth of your guilt; thus, if possible, would we move you to seek for and obtain forgiveness. Upon a quiet Sunday evening, while as an humble worshipper the widowed mother of your victim

sent up her prayers to God, her infant daughter, through your accursed lust, was put to death. Your fiendish passion heeded not the tears, the piteous moans, and the last beseeching glance, the awful terror of that defenseless child. She exchanged the agony of earth for the glory of Heaven; the divine Master took her and folded her to His bosom. While we abhor your crime, we pity you. Your earthly hopes must now perish, for human forbearance has reached its limit. Our faith teaches us to believe that divine mercy is alone limitless; and covered all over as you are with the blood of a little child, to that mercy you must look for safety. As the rays of the morning sun penetrate your cell, remember that the business of your short life will be to repent. As the hours of each day swiftly glide along, and thus shorten your passage to the grave, earnestly study how to be forgiven. When the gloom of night settles around you, remember that the blackness of darkness will soon shroud you forever from mortal vision in the grave. We beseech, we implore you, henceforth to live, and breathe, and have your being as though each week, and day, and moment, with articulate voice, rang into your ear this solemn sentence—"Prepare to meet thy God."

And now nothing remains for us to do but to pronounce the judgment of the law, which judgment is that John Hanlon, alias Charles Hanlon, alias Charles E. Harris, the prisoner at the bar, be taken from hence to the jail of the county of Philadelphia, from whence he came, and from thence to the place of execution, and that he be there hanged by the neck until he is dead. And may God, of his infinite goodness, have mercy upon his soul.

### THE EXECUTION.

Two or three weeks before his execution, Hanlon sent for George Smith, the detective, and when Mr. Smith entered the cell, Hanlon said his object in sending was to ask Smith to forgive him for what he had said in his speech in Court,

when sentenced. Mr. Smith replied that he had long since forgiven him. Hanlon then requested Mr. Smith to see Detective Taggart and Michael Dunn, the witness, and to ask them also to forgive him. Hanlon added, significantly, "You and I know how it was, and it's no use talking about the case now." The interview continued nearly a half hour, but no further reference was made to the case. For a time after his conviction he had hopes of a commutation, but when he sent for the detective, he gave up all idea of escaping the penalty and began a most rigorous penance. He deprived himself of the use of tobacco, strapped rough blankets around his body next to the skin to prick and goad the flesh. He walked barefoot on the stone floor; declined to sleep in bed, but lay on the cold floor, without covering; and for a period of seventeen days, up to the final day, took no food but bread and water. He was assiduous in his devotions, and was affable and pleasant to all who visited him. Fathers Barry and Mooney, both of the Roman Catholic Church, were his spiritual advisers, prepared him for death and gave him absolution.

He was hanged on February 1st, 1871. Besides Sheriff Leeds,<sup>9</sup> the officers of the prison, the Sheriff's jury, deputies, physicians, the District Attorney, the prisoner's counsel, the representatives of the press, were the only persons present. None of Hanlon's family attended.

Hanlon ascended to the scaffold quickly and knelt between the kneeling priests who still conducted the devotional services of the Church, Father Barry reading, and Hanlon with Father Mooney making the responses. When they rose to their feet, Father Barry said that he had been requested by the condemned man to state that he had no communication to make to the public further than that he desired to express his sincere thanks to the prison inspectors, keepers and offi-

<sup>9</sup> LEEDS, William R. Member of Legislature. Delegate Republican National Convention 1876, Chicago Convention 1880-1884. Chairman Republican City Committee 1865-69, 1883-87. Sheriff of Philadelphia 1870.

cers, for their uniform kindness to him, and also to thank his counsel.<sup>10</sup>

Hanlon had intended to die in silence, but he changed his mind, and stepping forward, threw up his right arm and gesticulating with it, said in a loud voice, which however faltered after he had uttered two or three words: "To those who have ever injured me or have ever done me any wrong, I forgive them, and ask God to forgive them. And all whom I have injured in any way whatsoever, or against whom I have had any ill-feeling, I ask their forgiveness and God to forgive me." When the speech was ended, he shook hands with and bade good-bye to the clergy and Sheriff. The priests descended to the ground, and the Sheriff and officers adjusted the noose around the neck, the white cap over the face, and the manacles on the hands, Hanlon doing what he could to aid them. The priest kneeling on the stairway held up the crucifix; Hanlon exclaimed in a low, moaning, anxious voice, "Jesus have mercy upon me! Holy Mary, pray for me! St. Joseph intercede!" The cord was pulled by the Sheriff, the platform fell, and Hanlon, falling, was choked, as his last earthly prayer was uttered.

<sup>10</sup> Later it was given out that he had left a statement in his cell, denying that he confessed the crime to Dunn, but admitting that what he asserted in court in regard to Mr. Perkins and the Bible was false. In it he forgives everybody, but nowhere asserts or intimates his innocence of the crime of which he was convicted and executed.

## THE TRIAL OF WILLIAM BOOTT FOR DELIVERING A CHALLENGE TO A DUEL, BOSTON, MASSACHUSETTS, 1834.

### THE NARRATIVE.

Not only in the South and Southwest, but even in the New England States, challenges were sent and duels were fought a little over seventy-five years ago, and this in the face of statutes prohibiting and severely punishing both acts. In a political quarrel, Robert C. Hooper had challenged John S. Jones to fight a duel in Rhode Island and the duel was actually fought. William Boott was a friend of Hooper; he had gone with him and had been his second on the field. So when the parties returned Boott was indicted under the Massachusetts statute for unlawfully delivering the challenge. But at the trial the prosecution had a hard time of it. None of the witnesses could remember much of the affair and nothing of Boott's connection with it; and the jury promptly acquitted him.

### THE TRIAL.<sup>1</sup>

*In the Municipal Court, City of Boston, June 1834.*

HON. PETER O. THACHER,<sup>2</sup> *Judge.*

*June 15.*

The indictment previously found by the Grand Jury under Mass. Stat. of 1804, Chap. 123, Revised Statutes, c. 125 & 7, charged that Robert C. Hooper, on the twenty-ninth day of January, 1834, at Boston, did unlawfully and maliciously by a written message, provoke, excite, and challenge one Joseph S. Jones to fight a duel with him said Hooper, with dangerous weapons, to-wit, with pistols,—no duel being or hav-

<sup>1</sup> Thacher's Criminal Cases, see 2 Am. St. Tr. 858.

<sup>2</sup> See 2 Am. St. Tr. 858.

ing been fought thereon within said commonwealth of Massachusetts; and that the said William Boott did become, and then and there voluntarily and knowingly, was a second, agent and abettor of him the said Hooper, in the giving, sending and delivering of the challenge and message aforesaid from the said Hooper to the said Jones, against the peace and contrary to the form of the statute in such case made and provided.

*Mr. Parker*, for the Commonwealth; *Charles P. Curtis*, for the Defendant.

#### WITNESSES FOR THE COMMONWEALTH.

*Rev. E. S. Gannett.* Am acquainted with Mr. Hooper; saw a portion of the correspondence; heard him read some papers signed by himself, and some which were signed by Mr. Jones or Captain McNeil; did not read the signatures, they related to the difficulty which had taken place, not to a duel. He stated that a duel took place in consequence between himself and Mr. Jones. I never knew who were seconds except from public rumor. I never conversed with Mr. Boott; had but one conversation with Mr. Hooper.

*Cross-examined.* Could not identify the papers he read; because I had seen some of them before, in others' hands, and I think it would be difficult for me to say which he read to me. Mr. Boott was not present at that interview. Saw no original letter, and have no recollection of seeing any copy of a letter signed by Mr. Jones. Cannot swear that I saw any letter addressed to Mr. Jones.

*Joseph H. Buckingham.* Had two conversations with a gentleman whom I supposed to be Mr. Hooper; the first conversation was in a barber's shop, and we adjourned into my office; am

junior editor of the Courier. The conversation related to a duel.

*Mr. Parker.* Did Mr. Hooper say he had fought a duel?

*Mr. Curtis.* Mr. Boott is not to be tried or convicted by the declarations of Mr. Hooper or any third party, when he (Mr. Boott) is not present. So far from Mr. Boott being party or privy to Mr. Hooper's statements, the testimony which Mr. Buckingham is apparently about to make is a complete surprise.

THACHER, J. As the jury must be satisfied that a challenge was sent by Robert C. Hooper, any evidence tending to prove his guilt is admissible, although he is not upon trial. Even if Robert C. Hooper has been tried and convicted of the principal offense, in which case the record of his conviction would be admissible evidence of that fact, upon this trial, it would yet be competent for the defendant to contest the fact of the guilt of the principal, and to offer evidence to prove his innocence.

*Mr. Buckingham.* I left the barber's shop first, and he followed to my counting room. The gentleman in the shop came and handed me a paper which he wished me to read; read it, put



it into my pocket, and told him I would be in my office all the forenoon. He followed me to my office. The paper related to a duel, and I advised him to drop the matter; presume he wished to have the paper published; it had no signature; he did not say who was the challenger. He said the duel was fought with a Mr. Jones. Do not remember whether the paper said that Mr. Jones was the person with whom he fought. I should not know the paper again. Saw it was a very improper one to publish and handed it back to him. Do not know Mr. Boott.

*Cross-examined.* The paper was not a correspondence; it was a statement of the facts which led to the duel. The duel he said was fought in Rhode Island.

*William G. McNeil.* Know Robert C. Hooper; never had any conversation with him about a duel fought in Rhode Island; was not present at the duel; do not personally know that Mr. Hooper challenged Mr. Jones; do not recollect to have seen any correspondence between Mr. Jones and Mr. Hooper; do not know who were the seconds, except from rumor; have never had any conversation with Mr. Boott about any duel, nor about the challenge; don't know that Mr. Boott was agent, second, or abettor in sending a challenge to Mr. Hooper.

*Gen. H. A. S. Dearborn.* Had a conversation with Mr. Hooper previous to the duel, and understood from the conversation that he had challenged Mr. Jones; don't know that I ever spoke to Mr. Boott, until after the duel took place; saw him once after the duel, and that was accident-

ally in the street; he then gave no information that he had been second, or carried the challenge, or had taken any steps in sending the challenge.

*Mr. Parker.* Is it not usual that the person who acts as second, carries the challenge?

THACHER, J. Whatever is usual on such occasions, it might so happen, that, in this instance, if any challenge was given, it was not in writing, and that it had been carried by some one else. Whatever the defendant has done, whether within the county of Suffolk, or elsewhere, may be proved, but it will be necessary to prove some act done within that county, in order to bring the offense within the jurisdiction of the court. If the challenge was written within the county, and sent out of it, or if it was written out of the county, and sent into it, it will be sufficient to sustain the jurisdiction of the offense. Crimes are in their nature local, and if not proved to have been committed within the county where they are laid, the party accused is entitled to a verdict of acquittal. Where a misdemeanor consists of distinct facts, the whole can be tried in the county wherein any distinct part can be proved to have been done. It was said by Abbot, Ch. J., in pronouncing an opinion on this point, in the case of *Rex v. Sir Francis Burdett* (4 Barn. & Ald. 180), "I am clearly of opinion, that if any such part of an entire misdemeanor be proved to have been done in the county in which the indictment is preferred, there is enough to satisfy the locality of trial." In this case the charge against the defendant is for acting as second in the giving, send-

ing, and delivering the challenge to Hooper. He is not on trial for acting as a second in fighting the duel. That act, having been done without the commonwealth, was not an offense against the law of this commonwealth. It ought to be shown that the defendant advised, dictated, wrote, or carried the challenge, or that he arranged the preliminaries of the meeting, which afterwards took place in Rhode Island, or that he procured the pistols, or did some other act within this county, from which the charge in the indictment could be fairly inferred; otherwise he must be acquitted. I cannot therefore permit the question to be answered.

*Gen. Dearborn.* I never saw Mr. Boott and Mr. Hooper together in my life.

*Cross-examined.* Mr. Hooper was at my house when he told me he had challenged Mr. Jones; it was one or two days before the duel took place; my house is in Roxbury.

*Dr. H. G. R. Dearborn.* Know Mr. Hooper; understood from him that he had challenged Mr. Jones; don't know who carried the challenge, or whether it was in writing; was not present when the battle was fought; went to Rhode Island about the time; I did not go in company with any of the parties; returned with Mr. Boott and Mr. Hooper; joined them at the Half-way House in Walpole; believe they arrived there first; I had no one with me from Rhode Island to that house but the driver; and thence to Boston with Mr. Boott, Mr. Hooper and the driver in a four-wheeled carriage; we took supper at the Half-way House, it being after dark; they stated

there had been an exchange of shots; remember nothing respecting loading the pistols; don't recollect that it was said in Boott's presence who fired first, or who gave the word of command; do not know who came with Mr. Hooper to that house, as I did not see them get out; Mr. Boott got into the carriage with Mr. Hooper in town to go out. Knew something of the quarrel, but I had no conversation with Mr. Boott about it: do not know who carried the message to Mr. Jones; don't remember that Mr. Boott ever said anything about carrying the challenge, or about the manner of fighting; he told me that he thought it was probable a duel would take place; thought he was the friend of Mr. Hooper, but cannot say upon what that inference was founded; know of no other person who acted as Mr. Hooper's friend.

*Cross-examined.* Mr. Hooper and Mr. Boott did not get into the carriage together in Boston, but in Roxbury; heard no conversation on the road before the duel; did not accompany them at all to Providence; went to Providence with a letter to Mr. Boott; don't know what the letter was; did not receive it from Mr. Jones; met them at the Half-way House accidentally, and not by concert; never heard Mr. Boott say that he carried the challenge to Mr. Jones; don't know how long it was before the duel that I saw Messrs. Boott and Hooper in the street together; do not know that the challenge was in writing; left Providence two or three hours after I arrived there to come home, and did not see these gentlemen on the road

until I found them at the Half-way House. It was said that the exchange of shots took place in Rhode Island; was not the medical friend of either party; did not know that they had pistols at my father's house; don't think that Mr. Boott provided Mr. Hooper with pistols; Jones lived at the Tremont House.

*Daniel Parkman.* Do not know that Jones and Hooper fought a duel. Never had any conversation with Mr. Boott. Had a process against Hooper and Jones; know nothing which implicates Mr. Boott.

*Captain William A. Howard.* Mr. Hooper admitted to me that he had fought a duel with Mr. Jones; know nothing about Mr. Boott; saw the challenge; it was written and signed by Mr. Hooper; saw Mr. Boott and Mr. Hooper together about this time. Have no recollection of any conversation between them about Mr. Jones; know nothing which Mr. Boott has said or done, which leads me to believe him to have been a second; think that Mr. Boott's name was not in the challenge; don't know who went on the ground with Mr. Hooper.

The challenge was in Mr. Hooper's possession when I saw it; don't know that it was ever sent or that Mr. Hooper ever said that the challenge was sent.

*Henry W. Sargent.* Had some

conversation with Mr. Hooper previous to the duel; knew from him that he and Jones were about to fight; know nothing from Mr. Boott; did not see Mr. Boott from the Monday previous to the duel, which was on Friday, until day before yesterday.

*Thomas K. Davis.* Know Mr. William Boott and Mr. Jones; know nothing of this business except what I know as professional adviser of Mr. Jones, and my interview with Mr. Boott was in consequence of this relation which I bore towards Mr. Jones. Mr. Boott was no client of mine; went to see him a week or ten days after the duel, having heard that Mr. Hooper had been very imprudent in his statements, and asked him to advise Mr. Hooper to be more prudent, as both were under heavy bonds to keep the peace. Mr. Boott concurred with me in opinion. We then went into general conversation upon the events of the duel; remember he said a duel had been fought in Rhode Island. I understood from him that he was second to Hooper, and Gibbs second to Jones; that the weapons were pistols, and that both parties fired; do not remember that he said who were on the ground. He said nothing about the challenge; think he said the word was given by Mr. Gibbs; never saw the challenge; do not know who gave the challenge to Mr. Jones.

THACHER, J. (to the jury). Whether we regard the interest excited at the time, or the effect upon the parties under the law, this is a very important case as it regards the law of the land. It is undoubtedly an offense to carry a challenge. Still you must look into the evidence without favor or affection; there is no evidence introduced for the defendant, and he rests

solely on the defects of evidence in the government. You must forget all that is said out of doors, and confine yourselves to the evidence before you. The indictment in the first place charges Robert C. Hooper with having committed the offense of sending a challenge in this county, and secondly, it charges the defendant as aiding and abetting him in that act. You must take no notice of offenses in another county, or in another state. Both may be guilty, or Hooper may be guilty, and the defendant innocent. Are you satisfied that Hooper wrote such a challenge and caused it to be sent? Both Hooper and Jones lived in the same house, and in that house Hooper had in his possession a written challenge directed to Mr. Jones; and soon after the parties meet and exchange shots. You must first inquire if the offense of sending the challenge in this commonwealth is merged in the offense of fighting the duel in another state. But I consider the sending a challenge to fight, is a substantive offense, whether the duel is to be fought here or elsewhere. We know not whether fighting a duel in Rhode Island is an offense, probably it is; but it does not appear that the parties have been charged with the offense in Rhode Island. If they had been tried there, then the question would have become one of more consequence. They then would appear to have been tried as well for the act as for the preliminaries. To allow this objection to prevail, would be to instruct our citizens how to evade the laws. Satisfy yourselves, then, whether Hooper gave a challenge in this county; if he did, then so much of the indictment is proved.

But the defendant is charged not for Hooper's act, but for his own. Are you, from the evidence, satisfied that the defendant in this county acted as second and aid to Hooper? Was he seen in company with Hooper dictating, advising or carrying the challenge? Did he adjust the preliminaries or procure the pistols? I cannot find one of these things proved. Dr. Dearborn says he saw them once together in the street. But they started together from General Dearborn's in Roxbury, and they were together in Providence; but you are to say if he did anything in this county. If you find him guilty,

you will say that his agency commenced in a material respect in this county. It is a question of fact for you to settle; if you have doubts as to any of the points which must be proved to constitute the offense, they must operate in his favor, and then you must acquit him, otherwise you must find him guilty.

The *Jury* returned a verdict of *Not Guilty*.

# THE TRIAL OF ROBERT C. HOOPER FOR SENDING A CHALLENGE TO A DUEL, BOSTON, MASSACHUSETTS, 1834

## THE NARRATIVE

Two months after the trial of Boott for delivering the challenge, Robert C. Hooper was tried for sending it. But the evidence being about the same as in the Boott case (ante, p. 370), and quite as unsatisfactory, Hooper was acquitted also.

## THE TRIAL.

*In the Municipal Court, City of Boston, August, 1834.*

HON. PETER O. THACHER, *Judge.*

*August 11.*

An indictment under the same evidence as that in the Boott case (ante, p. 370) was returned at the February term, 1834, against Robert C. Hooper for sending a written challenge to fight a duel to Joseph S. Jones.

The same counsel were employed as in the Boott case.

## WITNESSES FOR THE COMMONWEALTH.

*Captain W. A. Howard.* Was in defendant's room at the Tremont House; defendant showed me a letter which he had written to be sent to Jones; saw at the same time several other letters, but only one addressed to Jones. It was a call on Jones for an apology for an insult offered by him to defendant on a former occasion; I advised defendant to alter some of the expressions which I thought too severe, and defendant did so; did not know that defendant had sent a challenge to Jones, and had not

heard defendant say that he had done so. Might, on the trial of William Boott, have said I had seen a written challenge from Hooper to Mr. Jones. Think I had confounded the correspondence between defendant and Captain McNeil with that between the defendant and Mr. Jones.

*Cross-examined.* Recognize the paper which defendant showed me on which was written the letter to Jones, which was afterwards cancelled, and underneath it the original draft of the

letter which was subsequently sent. The letter was in these words:

"Tremont House,  
"Tuesday morning.

"Having terminated my affair with Captain McNeil, I now offer you an opportunity of apologizing to me for your expressions and conduct on Saturday evening." It was subscribed by defendant and addressed to Mr. Jones.

*Henry W. Sargent.* About three o'clock, on the day when above letter was sent, saw the defendant get into a coach to go to

Charlestown, and defendant stated to him that he did so to avoid breaking the peace of this county or state; defendant told me that Jones had agreed to fight him or to meet him, cannot recollect which.

*Mr. Parker* then put in a written statement of the testimony of four witnesses, *Gannett, Buckingham, H. A. S. Dearborn, and H. G. R. Dearborn*, from the minutes taken at the trial of Boott, all of whom are either permanently or temporarily absent from the commonwealth, and whose testimony was admitted by defendant.

*Counsel for Defendant* contended that the Government must prove, 1, that the challenge was in writing; 2, that it was in the possession of the defendant, who had been required to produce it at the trial, or that it had been by him destroyed; and 3, that no duel had been fought within this commonwealth. He read in evidence a certified copy of the law of Rhode Island against dueling. It was authenticated by the signature of the secretary, and was under the seal of the state.

THACHER, J. Gentlemen of the Jury: You will consider the case on trial, without regard to public reports, or to anything which you have heard or read before the trial. You are to render your verdict not according to a general and undefined belief of what may have been done, but upon the law and evidence. Upon the general subject of duelling, it is sufficient to add to what has been already said with so much ability, that whoever takes the life of another in a duel, voluntarily engaged in, whether he gave or received the challenge, and under whatever circumstances of provocation, is deemed in law guilty of murder, unless the duel was fought under such circumstances, immediately following the provocation, that it might be considered a homicide in heat of blood, upon a sudden falling out between the parties, which might reduce the offense to manslaughter. The indictment is founded on the

following clause in the sixth section of the act of 1804, c. 123, "If any person shall by word, message, or in any other manner challenge another to fight in a duel, as aforesaid, when no duel shall be fought thereon, he shall be punished as a felonious assaulter," etc. To understand the nature of the offense and the meaning of the phrase as aforesaid, we must recur to the preceding clause of the section. "If any person shall voluntarily engage in a duel with rapier or small sword, back sword, pistol or other dangerous weapon, to the hazard of life, when no homicide shall ensue thereon." The challenge must be to fight with a dangerous weapon to the hazard of life. A challenge to fight a boxing match with fists, would not be within the statute, because it would not be considered a deadly rencounter with a dangerous weapon. The challenge may be given by word, or by a verbal message communicated by a friend of the challenger; or it may be in writing, delivered by the party himself, or sent by a third person; or it may be given in any other manner, by which it may be understood that one challenges or provokes another to a deadly contest. The offense may be described in all these ways, or in any of them, according to the fact; but as that may be uncertain, it may be described in each of these ways in separate counts, so as to meet the evidence at the trial in any aspect in which it may then appear.

The Legislature can punish only those violations of the peace, which are committed within its own jurisdiction. Whatever crime is done in another state is against the law of that state, and punishable there only. But high treason may be committed out of the limits of the commonwealth. It consists in levying war against the state to which we owe allegiance, and from which we are entitled to claim protection. This may be done by a citizen within its territories, or by joining himself to its enemies, and committing acts of hostility against his own country. The challenge to fight in a duel must be given within this commonwealth. The law does not say where it is to be fought, and therefore, I consider that it is not material whether it is to be fought within our own commonwealth, or



within a foreign state. If a duel is fought upon such challenge within the commonwealth, the offense of sending the challenge is merged in the act of fighting the duel, both acts being committed against our own law. But where no duel is fought within the commonwealth, no offense is committed against our law, but that of sending the challenge. If the duel is fought out of the commonwealth, then, as our peace is not violated by that act, there is nothing in which the offense of sending the challenge can merge. It would not be reasonable to say that no offense has been committed against our laws because a greater offense has been committed against the laws of another state. The laws of both are violated, and each may exact the penalty, when the offender can be found within its limits. It is a mere act of discretion, whether the state will punish the offender for the minor offense, committed within its own limits, after he has suffered perhaps an adequate punishment for the greater offense, committed within the limits of a foreign state.

These being the general principles of law, we are next to look at the indictment which contains a description of the offense. In describing an offense against a statute, it is necessary to bring it within the letter of the statute. But that the party accused may be enabled to prepare for his defense, it is always necessary to show the manner in which an unlawful act was done, as well as the time when, and the place where, it was done. The verdict of the jury is to be composed of what is alleged and what is proved; and to establish the guilt of the accused, the proof must, in every material respect, support the allegations. In this indictment there seems to be a double description of the offense, one of which is nearly in the words of the law, and is undoubtedly sufficient. It is in these words: "that R. C. H., on, etc., at, etc., intending to kill and murder one J. S. J., did unlawfully and maliciously, by written message, challenge the said J. S. J. to fight a duel with him, said H., with dangerous weapons, to-wit, with pistols; no duel being or having been fought thereon, against the peace, and contrary to the form of the statute," etc. But for the sake of a more

full, and as it was undoubtedly deemed by the learned and faithful attorney of the Government, by whom it was drawn, a more accurate description of the offense, the indictment goes on from the word "pistols" to repeat the allegation relative to the challenge, and adds "and that he, the said R. C. H., a certain challenge, in the name of him the said H. and in the form of a written message to him, the said J., directed, exciting and provoking him, the said J., to fight a duel with the said H., did then and there wilfully and maliciously write and direct and cause to be written and directed, which said challenge and written message was then and there concealed and destroyed by the said R. C. H., or some other person, to the jurors aforesaid unknown, so that they cannot set forth the tenor or the substance thereof, and that he the said R. C. H. the said written message did then and there wilfully and maliciously send and deliver, and cause and procure to be sent and delivered to said J., no duel being or having been fought thereon within said Commonwealth of Massachusetts," against the peace, etc., and contrary to the form of the statute.

If you are satisfied, from the evidence, that a written message was sent by the party to H. within this county, you will be authorized to find a general verdict of guilty, although the written message is not produced, nor evidence given of its destruction, and notwithstanding it shall appear that the duel was fought within the limits of a foreign state. The Government is not presumed to have the original challenge in its possession, and it seems to account sufficiently for its non-production, that all the parties concerned, principals and seconds, are indicted for the offense. Where the offense consists in making the paper itself, as in forgery of an instrument, the written paper should be produced, or its absence accounted for. Because, whether it was a deed or a note, whether it was within the statute or at common law, and whether genuine or counterfeit, may be important questions at the trial. A challenge may be verbal or written; the offense consists in sending the message, not in the form in which it is sent. By averring that a challenge was in writing, the Government make that fact

material to be proved; but the express language is not necessary; it will be sufficient to prove the substance of the message, and that the party sent it. Because it will be equally an offense, whether it was in words or in writing. It was wholly unnecessary to aver that no duel was fought within the commonwealth. Because the offense was committed by sending the challenge, and the Legislature have not undertaken in this act, to prescribe a punishment for any offense committed without the limits of this commonwealth. The expression "within said Commonwealth of Massachusetts" is not in the statute, but is inserted by the grand jury in the indictment, as the construction which they gave to the phrase, "no duel being or having been fought thereon." The indictment would have been sufficient without it, and it was therefore unnecessary to be inserted, and need not be proved. For allegations which are not essential to constitute the offense, and which may be omitted without affecting the charge, or vitiating the indictment, do not require proof, and may be rejected as surplusage.

The Government is not bound in this case to prove that no duel was fought within this commonwealth. In indictments founded on statutes, if there be any exception contained in the same clause of the act which creates the offense, the indictment must show negatively, that the defendant or the subject of the indictment does not come within the exception. If, however, the exception or proviso be in a subsequent clause or statute, or, although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is in that case matter of defense for the party, and need not be negatived in the pleading.

In indictments upon statutes, where an exception or proviso is mixed up with the description of the offense, in the same clause of the statute, the indictment must then show negatively, that the party, or the matter pleaded, does not come within the meaning of such exception or proviso. These negative averments seem formerly to have been proved in all cases by the prosecutor: but the correct rule upon the subject seems

to be, that in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as matter of defense; that is, the defendant must prove those facts from which the jury must infer the negative matter. But, on the other hand, if the subject of the averment do not relate personally to the defendant, or be not peculiarly within his knowledge, but either relate personally to the prosecutor, or be peculiarly within his knowledge, or at least be as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative.

But as this Court cannot take cognizance of any offense which is not committed within the limits of the County of Suffolk, it is essential that it should be proved, that the challenge was sent within this county. If, however, any material fact constituting that offense was done here, it will be sufficient. "For, all matters of crime are so local, that if it be not proved to be done in the county where it is laid, the party accused is as innocent as if he never had done the thing."

It appears in evidence, and was admitted by the counsel on both sides, that the duel was fought within the State of Rhode Island, and also that Hooper gave the challenge. But it does not appear by any direct evidence, where the challenge was given, nor whether it was verbal or in writing. It is for you to say, whether such circumstances appear, as satisfy you that a written challenge was sent within this county. If the challenge was written here and sent to another county, or if it was written elsewhere and sent into this county by the defendant, it will be sufficient. The burden is upon the Government to prove the fact. Because the duel was fought in Rhode Island by two persons residing in Boston, it by no means follows that the challenge was sent within this county. Nor, because it is assumed that the fact is known to the defendant, is he required to show where the challenge was sent; because a man may rest on his own presumed innocence, and no man is bound to accuse or give evidence against himself, nor ever to

give evidence in denial or extenuation of a fact charged against himself, until the prosecutor has made out a probable case of guilt.

The *Jury* returned a verdict of *Not Guilty*, and the *Defendant* was thereupon discharged.

# THE TRIAL OF HARRIS SEYMOUR, MOSES ROBERTS, HOLLOWAY HAYWARD, HENRY HOWARD AND JAMES GANSON FOR THE ABDUCTION OF WILLIAM MORGAN, NEW YORK, 1827.

## THE NARRATIVE.

In 1826 a bricklayer named William Morgan,<sup>1</sup> who lived at Batavia, New York, and was very poor, and who belonged to the Masonic Society, conceived the idea of earning some money, or satisfying a personal grudge<sup>1a</sup> by writing an exposure of the

<sup>1</sup> Morgan was born in 1776 in Culpepper County, Va. By trade he was a stone mason and bricklayer but saving up a little money he opened a small shop in Richmond. He moved to York (now Toronto) in Canada where in 1821 he became a brewer and was acquiring a competence when a fire reduced him to poverty, and forced him to remove to Rochester and then to Batavia, N. Y., where he resumed his trade. He became a member of the Lodge of Masons at Le Roy in 1825.

<sup>1a</sup> Different reasons have been given for his subsequent hostility to the order. One is that in 1826 he signed a petition for the establishment of a Chapter at Batavia, but objection was made to his signature because if the charter was granted he would become a member of the new lodge and he was not desired. So a new petition was drawn up and signed without being shown to him and when the charter was issued and the Chapter was organized he was deeply mortified to find that he was not a member. He at once determined to be avenged not only on his fellow townsmen who had excluded him but on the whole Masonic fraternity by writing a book revealing the secrets of Masonry. 5 McMaster Hist. People of the United States 109. A newspaper of the period gives another reason: "The fact is, as we heard it from a gentleman, who heard it from Capt. Morgan's own lips, that ill-fated martyr to liberty had been a brave officer in our army, and in that capacity, had traveled over the Union, and been conversant with all the lodges and chapters. He had counted the number of Masons, and found it alarming—he had penetrated all their dark intrigues and manoeuvres, by which they had contrived for years to monopolize all the honors and emoluments of the government—he had discovered a thousand proofs of their undue influence and management; and he

secrets of Freemasonry. He obtained a publisher in the person of Mr. David C. Miller, the editor of a local newspaper. The Masons learning that he had written such a book and had obtained a publisher, caused his arrest and imprisonment on a frivolous complaint and searched his house for the manuscript in his absence. Later he was arrested again for a debt of \$2 and imprisoned under an execution for the debt and costs. The next evening a man named Loton Lawson appeared at the jail, paid the debt and persuaded the wife of the jailor (who was absent) to release him. At the door he was seized by a number of men, and despite his struggles and cries, was hurried into a carriage and taken to Fort Niagara, at the foot of the river, which was unoccupied at the time, and placed in a cell. At this place all trace of him disappears: he was never seen afterwards. Some months later a body was found floating in the river and identified by several persons as the body of Morgan. But this the Masons stoutly denied and the body was afterwards identified as that of a missing Canadian.

In the meantime great efforts had been made to obtain the manuscript of the book. Alarmed for the safety of her husband, Mrs. Morgan the next day after his abduction departed from Batavia to Canandaigua under the pretended protection

was bent upon preparing, as a continuation of his illustrations of Masonry, a full and luminous development of all these things; and it was to prevent him from going on with this work, more than to punish him for what he had done, that his death was determined on! He told our friend that he considered it a sacred duty which he owed to his country, to unveil the plots and intrigues of the Order, which were, he said, equal to those of the Jesuits in cunning and duplicity; that he knew he should risk his life, and in all probability lose it. But, said he, I am old, and cannot live much longer, and I can do little good in any other way than that which I propose; and do it I will, let the consequences be what they may. The generous and gallant patriot, the glorious and exalted martyr in the cause of freedom, did not live to do what he intended—but the purity of his intentions, and the awful consequences to himself, of making them known, are now sufficiently brought to light, to entitle his memory to our everlasting veneration and gratitude, and his persecutors and assassins to the detestation and abhorrence of the present, and of all future generations.” *Report of the Trial, New York, 1827, post.*

of two Masons, who agreed to bring her to him on condition that she would give them certain manuscripts which he had directed her to keep safe. Here she was detained, her fears magnified until the manuscripts were obtained by the men, when she and her infant were sent back to Batavia in the stage. A few hours later a crowd of men with clubs appeared and forcibly seized David C. Miller on a pretended criminal process issued by a Justice in the county and carried him to an adjoining village, where he was detained until dark, locked in a room and guarded by five men. When his friends and counsel at last found him, and he was brought before the Justice it appeared that the process was a civil suit and no one appearing to prosecute it or to declare the cause of action, and no warrant being returned, he was discharged. A few days later his printing office was discovered to be on fire, with all the marks of an incendiary.

Such a series of outrages, in which the Fraternity seemed degraded into a lawless mob for the subversion of civil rights and personal liberty, could not fail to arouse the people. Public meetings were held in most of the towns and counties near the scene of action, addresses voted and committees of investigation appointed. Indictments were found against a large number of the suspected persons and rewards were offered for information as to the whereabouts of Morgan and for the discovery of the offenders, by the local authorities, the Governor of the state and the Lieutenant-Governor of Upper Canada.

At the court held at Canandaigua in January, 1827, Loton Lawson, and three others were found guilty on their own confession of the abduction of Morgan from Batavia and sentenced to imprisonment in the county jail, for different terms, from two years to one month. In August, Harris Seymour and eleven others were tried on the same charge, but acquitted. The public charged that the defendants on the first trial had pleaded guilty to prevent the investigation of the crime and that the jury in the second had been mere tools in the hands of the Masons.

The opinion that Morgan had been murdered and that the



body found in the Niagara River was his took possession of a large number of the people of the surrounding country, notwithstanding the verdict to the contrary of a coroner's jury,<sup>1a</sup> and a violent wave of indignation against the Masonic fraternity spread through New York and the adjoining states. Anti-Masonic Societies were formed on all sides and they resolved themselves into a political party; the Anti-Masonic Party entered the arena of national politics, nominated William Wirt, of Maryland, for President of the United States and carried one state, Vermont, in the election of 1832.

### THE TRIAL.<sup>2</sup>

*In the Ontario General Sessions, Canandaigua, New York, 1827.*

HON. NATHANIEL HOWELL, <sup>2a</sup>	} Judges.	August 22.
HON. MICAH BROOKS, <sup>3</sup>		
HON. ARPHAXAD LOOMIS, <sup>3a</sup>		

The following persons had been indicted by the Grand Jury for conspiracy and abduction. The indictment contained four

<sup>1a</sup> *Post*, p. 450.

<sup>2</sup> *Bibliography*. \**"The Trial of James Lackey, Isaac Evertson, Chauncey H. Coe, Holloway Hayward, Hiram Hubbard, John Butterfield, James Ganson, Asa Knowlen, Harris Seymour, Henry Howard, and Moses Roberts, for Kidnapping Captain William Morgan; at the Ontario General Sessions, held at Canandaigua, Ontario County, August 22, 1827. 'Nor wife, nor children more shall he behold—Nor friends, nor sacred home.'* New York. Printed for the Publishers. 1827." \**"Illustrations of Masonry by one of the Fraternity who has devoted thirty years to the subject. With an account of the kidnapping of the author.* New York. Printed for the Author. 1827."

<sup>2a</sup> HOWELL, Nathaniel. (1770-1851.) Representative in Congress, N. Y., 1813-1815. Died Canandaigua, N. Y.

<sup>3</sup> BROOKS, Micah. (1775-1857.) Born Cheshire, Conn. Justice of the Peace, New York, 1806. County Judge 1807-1827. Member of Assembly (N. Y.) 1808-1809. Congressman 1815-1817. Member of State Constitutional Convention 1821. Presidential Elector 1824.

<sup>3a</sup> LOOMIS, Arphaxad. (1798-1885.) Born Winchester, Conn. Member of Legislature, N. Y. Member of Congress 1837-1839.

counts. First, for conspiracy to assault, false imprison, kidnap and carry away to parts unknown, William Morgan; second, for a conspiracy to carry him to parts unknown; third, for the forcible abduction and kidnapping of him; fourth, assault, false imprisonment and carrying him away out of the jurisdiction of the state.

*Mr. Whiting*, District Attorney, *Jared Wilson*, *Bates Cooke*,<sup>4</sup> *John Dickson*,<sup>5</sup> *O. Benjamin* and *T. F. Talbot*, for the People.

*General Marvin*,<sup>6</sup> *General Matthews*, *M. H. Sibley*,<sup>7</sup> *H. F. Penfield*, *D. D. Barnard*,<sup>8</sup> *Ebenezer Griffin*, *W. H. Adams* and *W. Hubbell*,<sup>9</sup> for the Defendant.

*Mr. Whiting*, District Attorney, called the defendants, viz.: Harris Seymour, James Lackey, Isaac Evertson, Chauncey H. Coe, Holloway Hayward, Hiram Hubbard, John Butterfield, James Ganson, Asa Knowlen, Henry Howard and Moses Roberts, and moved for their trial.

*Gen. Marvin* said that he should move separate trials for certain of the defendants.

The COURT suggested an arrangement with the counsel for the People.

*Mr. Whiting* said that he had reflected upon the propriety of trying the defendants separately and designed to try Evertson and Hubbard together, after the trial of the others. The guilt or innocence of all of the defendants resting, as it did, upon the same facts and evidence, the propriety of trying

<sup>4</sup> COOKE, Bates. Representative in Congress (N. Y.) 1831-1833. State Controller 1839-1841. Bank Commissioner 1840. Died 1841.

<sup>5</sup> DICKSON, John. (1783-1852.) Born Keene, N. H. Member of Congress (N. Y.) 1831-1875.

<sup>6</sup> MARVIN, Dudley. (1786-1856.) Born Lyne, Conn. Representative in Congress (N. Y.) 1823-1829. 1847-1849.

<sup>7</sup> SIBLEY, Mark Hopkins. (1796-1852.) Born Great Barrington, Mass. Member Assembly (N. Y.) 1834, 1835. State Senator: Member of Congress 1837-1839. County Judge 1846.

<sup>8</sup> BARNARD, David Dewey. (1797-1871.) Born Sheffield, Mass. Dist. Attorney Monroe County, N. Y., 1826. Member of Congress 1827-1829. 1839-1845. United States Minister to Prussia 1850-1853. Author of numerous reviews and speeches.

<sup>9</sup> HUBBELL, William S. Born N. Y. Member Assembly (N. Y.) 1841. Congressman 1843-1845.

them together must be apparent to all. Separate trials would consume more time than the Court could devote to criminal business.

*Gen Marvin* asked the Court for four separate trials, putting Hubbard, Coe and Lackey in the first, Ganson in the second, and Knowlen and Butterfield in the third, and the other defendants in the fourth class.

The COURT, at the suggestion of the *District Attorney*, directed that Seymour, Roberts, Howard, Hayward and Ganson be tried first, and the others together subsequently.

The following jurors were then empanelled: Ira Case, Allen Brown, Isaac T. Holmes, John Nicholson, Josiah Moffit, John Woodhull, Gideon Hurd, Ansen Howell, George Brudridge, William K. Pound, Jeremiah Like, Adonijah Skinner.

Several others were drawn on the jury, but asked to be excused from serving, as they had made up their opinion as to the guilt of the defendants.

*Mr. Whiting* (to the jury). Nearly an entire year has passed away since the abduction of William Margan, and yet we have no knowledge of his fate. If it was proper to bring the perpetrators of that crime before courts of justice to answer for the breach of laws, and to receive punishment for that great and unparalleled violation of the liberty of the citizen: it is now more proper than ever—for time has confirmed our fears, and left the community fully justified in the belief that their worst apprehensions for Morgan's fate have been well founded. It is therefore just and proper that these prosecutions should be persisted in, till the laws are vindicated and the guilty brought to punishment. There is one advantage, however, which we can do and derive from lapse of time in relation to our inquiries. The excitement which follows the commission of great offenses has in some degree subsided; and though our views of the enormity of the transaction are the same, yet now when passion is silenced, we can deliberate upon this subject with calm and sober judgment; and in whatever we may do, we proceed with that dispassionate reflection which should always mark the conduct of men deliberating upon

great and serious subjects, and the right decision of which concerns the best interests of public liberty and the private security of the citizen.

The crime, with the commission of which the defendants stand charged, is that they conspired together to secure and falsely imprison William Morgan; that in pursuance of such conspiracy, they seized him by force, and carried him against his will, and without any legal warrant or justifiable cause, to parts and places without the territory and jurisdiction of the State of New York, and in one count to parts and places unknown. They are also charged with having assaulted him, seized him, falsely imprisoned, secreted and detained him, from the day of his caption to the time of finding the indictment. These charges constitute the offenses committed by the defendants and others against the laws of this state, in the forcible and violent abduction and detention of this man, as the law existed at the time of committing the offense.

In order to prove a conspiracy it is not necessary to establish the fact that a conspiracy was actually formed, and a precise agreement entered into: the conspiracy and confederacy among men to effect an unlawful purpose, is derived and inferred from their acts and conduct; and hence if it be established that two or more men are committing acts which tend to the perpetration of a crime, or to the injury of an individual, the law infers that they act in pursuance of an agreement previously formed. And there is good reason for this rule; for if the prosecutor were held to prove a positive agreement among conspirators, justice would in almost every instance fail. Men do not call witnesses to their criminal intents and conduct; offenses are designed and generally committed in secret, and in such manner as to elude observation and detection. The rule, therefore, in this case is one of necessity and of salutary effect; and by it your views of the offense charged on the defendants will be governed.

The facts which gave rise to the conspiracy which, I am authorized to say, existed among the defendants and others, are briefly that William Morgan was compiling a book profess-

ing to reveal the secrets of Masonry, which book was printed in Batavia by David C. Miller. The means of suppressing or preventing the publication of that book was a subject of deliberation among Masons in various parts of the country, and we expect to be able to show that it was determined that the only effectual mode of preventing that publication was the removal of the man; or having the power over him, to prevent his agency in the work. If they could have obtained possession of the papers then prepared by him, he would have written others, so that without the power of preventing his ability to write, their project would have been useless. In pursuance of this plan and governed by these views, we say that these defendants procured a warrant for Morgan from a magistrate in this county, went to Batavia and brought him here; on his examination he was discharged. He was then committed to jail, on an execution for a debt due one of the conspirators, and on that next evening (the twelfth of September last) was decoyed from the jail, and by force seized by several men, put in a carriage, driven to Rochester, and from thence to Fort Niagara, at which place all intelligence ceases; and every inquiry as to his subsequent fate, has proved fruitless and unsatisfactory. Now I am not bound to prove all these facts, as to his removal to Fort Niagara; if I can show him in their hands, by force, and that they removed him secretly, it is enough. The man is then in their custody, and the laws, the sovereignty of this state, may demand him at their hands. If they had a right thus to arrest a citizen, and thus to transport him, let them show it. But if they do not, we have a right to infer that their acts were lawless, and to charge them with the destruction of the liberty of this unhappy man; and if his blood be shed, that also is upon them. With this brief statement of the law and facts, I invite your close attention to the testimony which I will now proceed to introduce, and refer you to that for a particular knowledge of the case.

## WITNESSES FOR THE PEOPLE.

*David C. Miller.* Have resided many years at Batavia; know William Morgan, who resided there in September last, and was engaged in writing a book of Free Masonry. Am the editor of a newspaper, in which the subject of the book was frequently mentioned. It was publicly known for four or five weeks that Morgan was writing the book, before he was taken off. The subject excited much feeling in the community. Morgan left Batavia on the 11th of September—Hayward and others took him off. Morgan's family still resides there. Morgan has never been heard of since. Heard of Morgan's arrest, soon after sunrise, and that he was confined in a room at Darnold's Inn, under charge of strangers. Went in pursuit of counsel, and did not see Morgan until he got into the carriage when I told him he must not go away as I was his bail for the limits. Hayward said Morgan must and should go. Observed that Morgan's countenance was pale and ashy, and his eyes set and glassy, and he paid no attention to what I said. Spoke again to Morgan who then started to rise, but was told by those who sat by him, in a low tone of voice, to sit still. I stood by the door of the carriage, but was pushed aside, and the officer told the driver to hurry on.

*Gen. Marvin.* I object to any thing that was said or done at Batavia concerning the bringing of Morgan to this place. The conspiracy charged alleges that Morgan was removed from this place (Canandaigua)—they can-

not therefore go into a conspiracy to remove Morgan from Batavia. They may say they mean to connect the conspiracies but such testimony would be irrelevant—the acts at Batavia were a mere assault.

*Mr. Dickson.* We intend to connect the transactions at Batavia and Canandaigua. We shall show such connections clearly. We shall show common acts and common objects and although we may not combine all the offenders, still the testimony now offered is admissible.

*Mr. Wilson.* If they show that the overt acts of the parties in all the counties tended to a common object, it was admissible, otherwise the prosecutors could establish nothing, nothing that was consummated in any one county. The overt acts were continuous and extended to several counties; evidence showing generally the character of the conspiracy is strictly legal. All that is necessary is to show sufficient acts done in this county to give the Court jurisdiction.

*Gen. Marvin.* I contend that before the prosecution can go into testimony showing a conspiracy abroad, they must prove overt acts done here.

The COURT overruled the objection, saying that it could not restrict counsel in cases of conspiracy, particularly in the order of testimony.

*Mr. Miller.* Hayward told the driver to go fast; the stage went off so fast that some of the party was left, and had to run to overtake it. Four or five persons were in the coach, and one sat on the box with the driver.

*Cross-examined.* Have testified in part to the same history before; don't recollect whether I then stated the appearance of Morgan's countenance and eyes, but have said so frequently in conversation and in my paper; my impression is that Hayward is the man who said Morgan must and shall go.

*Dr. Samuel Butler.* Live in Stafford; Major Ganson then kept a public house there. Saw a coach driving up to Ganson's door on the Saturday evening previous to Morgan's being carried away from Batavia. Was introduced by Ganson to a man he called Seymour from Canandaigua. He said he had a warrant for Morgan and passed into the dining room where several persons joined him. I asked what they expected to effect by taking Morgan off; one of them replied, we have started for that purpose and shall go. E. G. Smith, Pratt, of Le Roy, Willard Eddy and some others were in this room; told them it was bad policy to meddle with Morgan. Was requested to inform Follett and Seaver that they were coming. Saw Follett at Batavia that evening and gave the message to him; he replied, tell them not to come, our village has been troubled enough already. Met the party on my return, two miles east of Batavia, and told them what Follett said. Ganson was with them. The Canandaigua party got out of the coach, and one of them said, I have started to go to Batavia, and shall go there. The Canandaigua men walked on, on foot, and the coach returned. Ganson and others returned with the coach. A small wagon, in com-

pany with the coach, turned about also; it was eight or nine o'clock in the evening. I knew previously that Morgan was publishing a Book on Freemasonry. More than six persons were in the carriage; had talked with Ganson about the book; was invited to attend a meeting on Friday evening previous, at Le Roy, to concert measures for the suppression of the book, but did not go. Ganson told me that men of Canandaigua, Batavia, Rochester and Buffalo had met on the premises Friday evening to concert measures to suppress the book; don't know that either of the parties now on trial attended that meeting; saw Ganson, Lesley, Towner and Eddy, the evening of the day Morgan was taken off, with others devising means to obtain his manuscript papers.

*Cross-examined.* Can't say positively that it was Seymour or Sawyer that was introduced to me—don't know how I got the impression; don't know but I might think it was Scofield if I knew that a person of that name was present; never heard Ganson say any thing about carrying off Morgan—Ganson was at home on Monday, Tuesday and Wednesday, engaged in mowing.

*Francis Hopkins.* Lived at Batavia in September last—drove a stage east from Batavia on the morning of tenth of September. Chesebro, Harris Seymour, Hayward, Morgan and four other persons were in the stage—Chesebro rode on the seat with me; was told to drive fast till we got out of the country—did drive fast, Chesebro was afraid that Morgan would be



rescued—drove to Avon (25 miles) in three hours. First hesitated about going for fear that I was doing wrong, but was induced to proceed on Chesebro's assurance that Ganson would indemnify me—Ganson passed his word that I should not be harmed; could not understand any of the conversation in the coach.

*Cross-examined.* Heard on starting that Morgan was on the limits—this was a reason why I hesitated; knew there had been a good deal of trouble about Morgan. Ganson said, "Drive on, there is no danger, I will see you harmless." Davids said, "They are going to smuggle Morgan away." Heard no complaints in the stage; think Morgan got out at Le Roy; Chesebro hurried me on; he often rose up, looked back, and said that if any one came to take Morgan they would not get him alive.

*William Thompson.* Am Sheriff of Genessee County; saw none of the present defendants at Canandaigua on the tenth of September; saw Chesebro and informed him that Morgan was on the limits.

*Israel R. Hall.* Saw a post coach pass through Le Roy on evening of tenth of September. Hayward, Howard, Chesebro, Voorhees, and others were in it. Have seen Morgan but don't recollect him. Supposed the party had come to Le Roy to assist in laying the corner stone of an Episcopal church with Masonic honors.

*Nathan Follett.* Saw Chesebro, Seymour and others at Batavia on the morning of eleventh of September. Saw Dr. Butler

on the evening previous. Was at Darnold's when the party left with Morgan for Canandaigua. Talked with Chesebro about their object at Batavia.

*Jeffrey Chipman.* Morgan was brought before me on a warrant on eleventh of September, examined and acquitted. Hayward, the officer, was with him. Dr. Lakey, Everton, Lawrence, Chesebro, Kingsley, and Bouge were in my office during the examination. After Morgan was acquitted. Chesebro asked for a warrant against him for a tavern debt of \$2 at Ackley's, for which judgment was rendered and execution was issued. Morgan offered his coat to Hayward as security, but it was refused. Hayward asked Morgan to step out of doors, and I saw no more of him. The execution amounted to \$2.69. Chesebro applied for the first warrant on a charge of theft in stealing a shirt and cravat of E. C. Kingsley. Heard Dr. Lakey speak of Morgan as a bad character and not to be trusted.

*Mr. Kinglsey.* Knew Wm. Morgan. In September Dr. Lakey asked me to walk into Chipman's office, when after considerable conversation a warrant was issued. Objected at first to the course, but finally consented. Evertson, Chesebro and Lakey said Morgan was a man of base character, and an impostor. Chesebro said that Morgan was not a Mason. Lakey also appeared very indifferent at Morgan's conduct. When Morgan first came here he was well received by Lakey and Howard. Supposed that Morgan was a lecturer on Masonry. Was induced by their representations to



proceed against Morgan; should not have proceeded against him otherwise; did not request Chesebro to call on Squire Chipman.

*Cross-examined.* Squire Chipman presented a paper in the form of an oath, necessary to be taken before a warrant was issued. I objected, because I did not think the shirt business amounted to larceny, and did not think the law would justify such a proceeding. May have said that Morgan had disgraced himself and ought to be disowned; may have said to Masons that their brother Mason had stolen his shirt and cravat. The Masons were all busy about Morgan. Dr. Lakey once said he would rather pay the value of the shirt and cravat than have a Mason so disgraced.

*Aaron Ackley.* Don't know William Morgan. He never was indebted to me. Never assigned any debt against Morgan to Chesebro; Chesebro never had the right to prosecute in my name. Never found Morgan's name on the tavern books.

*David Darnolds.* Saw a party at Batavia where I keep a public house, in September last; knew Seymour only; the party was said to be from Canandaigua; recognize Hayward as one of them; there were five or six of the party; it was on Sunday evening; Morgan was taken away by them the next morning in a coach; sun half an hour high.

*Cross-examined.* Morgan took breakfast with me, which was paid for by one of the party. Col. Miller came up; shut the coach door myself; saw nothing unusual from cases of arrest of criminals.

*Mrs. Mary H. Hall.* Am the wife of the jailor.

*Gen. Marvin.* We admit all that is alleged in taking Morgan to parts unknown, but deny that the present defendants were parties to the act.

*Mr. Whiting.* After a consultation with associate counsel, I feel that it would not facilitate business much to accept the admission; we prefer to proceed with the testimony.

*Mrs. Hall.* Morgan was released on Tuesday evening, between nine and ten. He had been committed for debt which Loton Lawson paid. Lawson led Morgan out of the prison, and while locking the door I heard a cry of murder; ran to the door and saw two men leading Morgan off, who was struggling. Lawson, Chesebro and Sawyer were assisting to liberate Morgan from jail; heard a rap upon the well curb which appeared to be the signal for a carriage which immediately passed down and soon returned. Objected to release Morgan at first, but finally let him out on Mr. Chesebro's assurance.

*Cross-examined.* Did not see Howard, Hayward, Roberts or Seymour that night.

*Mrs. Martha Davis.* Reside nearly opposite the jail; recollect the evening that Morgan was taken off; went to the door for wood; saw some persons standing near Bull's shop; one of them went away, and the other (Mr. Chesebro) came along near me; I spoke to him but he did not answer me; the other man soon came back and both walked away; heard a whistle; soon saw a scuffle and heard the cry of murder; counted nine men about there; saw the coach

pass and repass; the man who cried murder was dragged by two others; he cried three times and then seemed to have his voice suppressed; heard a heavy groan; saw Chauncey H. Coe near the jail; it was a very light night; think Col. Sawyer was the person I saw with Chesebro.

*Samuel Greenleaf.* Mr. Chesebro paid me for the use of a coach to go to Batavia, September last; the bill was dated on the tenth of September; don't know who went in it; it was an extra.

*Willis Turner* (a colored boy). Saw Sawyer and Chesebro near the jail; as they passed by me Sawyer picked up a stick; they went by the jail corner where they stood and talked; while drawing water heard a cry of murder and saw three men coming off the jail steps; Sawyer came to the well and gave two raps on the curb, and then went towards the three men. Chesebro went the same way; something was put into the middle man's mouth by Chesebro; Morgan pulled back, lost his hat and Sawyer picked it up. A carriage overtook them, the door was opened, and Morgan was put into it; four besides Morgan got in, and the carriage came back; don't recollect whether the curtains were up or down; had seen Morgan in Chipman's office; did not know the men who came out of the jail with Morgan.

*Cross-examined.* Saw six men only at that time, saw the carriage turn Kingsley's corner; saw Sawyer and Chesebro first, as he came out of the gate; kept near enough to see them; had

not got to the tavern when Chesebro put the handkerchief in Morgan's mouth; they hurried Morgan on as fast as they could; he cried murder twice after they got off the steps. They went beyond the pound, and went fast. Chesebro and Sawyer was along with them; Sawyer did not catch up at first; saw nobody about the streets when the carriage drove off; Mr. Osborn picked up the hat and handed it to Sawyer; Chesebro had on a snuff colored surtout coat and a black hat; Sawyer was dressed in grey clothes and a white hat.

*Mr. Whiting* stated that the circumstances against Knowlen were so slight he would now enter *nolle prosequi* in his case.

*Asa Knowlen.* Reside at Avon; saw a party at my tavern on tenth of September; Harris Seymour, Chesebro, Hayward, Howard, Roberts, and a man named Scofield or Scoville; Voorhees was not of the party; I got into the stage at Hosmer's and went to within two miles of Batavia; Butterfield joined the party at Caledonia; Smith at Le Roy, and Ganson at Stafford; the party from Canandaigua got out of the carriage and went on foot; did not know the reason why the coach returned; had no object in going further; the object of the party was to get William Morgan on a warrant, for stealing clothing; thought it was best, from all circumstances, for him to go back; heard no reason from the Canandaigua party getting out of the coach; did not discover any thing connecting the Batavia affair with their object; was in the room with a dozen or

twenty persons, but did not hear what they were conversing about; don't know whether they were in conversation about Morgan or not; saw Ganson at supper; Smith and Butterfield returned with me; Ganson came back on the box; did not hear the conversation with Dr. Butler when the coach turned about; did not tell Butterfield it was better for them not to hear what was passing; told him he had better have kept away, and go home again; something was said about the book; don't recollect what it was. The coach went eleven miles back that night; saw the party with Morgan the next day.

*Mrs. Lucinda Morgan.* Am the wife of William Morgan; was in Canandaigua in September last, returned to Batavia the next day; saw Ganson at Le Roy on my return; asked Ganson if he thought I would ever see my husband again. He said if I did not see him in a year I need not be surprised; and if I never saw him I should be handsomely supported, and my children educated. Ganson said he was glad to see me for he was then going to Batavia to make arrangements for my support. Have never heard from my husband since he left Batavia in September last; great but unavailing exertions have been made to obtain information of him; we have two children.

*James Sibley.*

*Mr. Whiting.* Have you ever conversed with any of the defendants about William Morgan?

*Mr. Sibley.* I ask the Court whether I am bound to relate a private conversation with a friend.

The COURT. You are bound to tell all you know relating to these defendants.

*Mr. Sibley.* Shortly (two or three days) after Morgan's abduction from Canandaigua, Harris Seymour informed me that he and others had been to Batavia for Morgan and brought him in. Seymour told the manner of arresting Morgan, who was of the party and how they got him to Canandaigua, and how he (Seymour) got left and had to run after the stage. After Morgan was in the stage some persons got hold of it and tried to stop it from going; one of the party jammed their hands off and the party started; he told how Morgan was examined at Chipman's office and acquitted, when one of the party came forward and accused Morgan of owing him \$2—Morgan confessed judgment, and an execution was immediately taken out, and Morgan not having bail was committed. Seymour then told me the particulars about Morgan being taken from the jail on the evening of the twelfth of September.

The COURT. We cannot allow the confession of one of defendants to be taken as evidence to criminate the associate defendants.

The *District Attorney* contended that where the confessions of a party went to establish what was charged in the indictment, the evidence was at least good against himself.

The COURT allowed the witness to proceed with the facts without mentioning the names of others than Mr. Seymour.

*Mr. Sibley.* Seymour said a certain person went to the jail

and pretended to be Morgan's friend, offered to pay the debt, invited Morgan home with him, and offered to furnish him with money; there was some difficulty on the part of Morgan and Mrs. Hall, but the man finally got him out, took him by the arm, and led him along until they met another man who was introduced as a friend but by a false name; when they got into the street they (those who were named to me) came up and Morgan resisted; he said something about Morgan being bound or blindfolded; Morgan was put into a carriage and taken to near Hanford's Landing; he was then shipped into another carriage and taken to Fort Niagara and put into the powder house, and that was the last they had heard from him. This confession was a few days after Morgan left here; something was said about a scuffle, but don't recollect what it was; heard a conversation, the object of which was to dispose of Morgan, and prevent the publication of his book. Heard many times that Morgan was about to publish a book revealing the secrets of Masonry, but not from these defendants. Saw several persons from the west on that business, one man from Batavia called on me and opened the subject of the book, stating that Morgan would publish it if means were not taken to stop it. This was about two weeks previous to the abduction. He stated that Morgan would publish the book with the higher degrees. Another person from Canandaigua said it must and should be stopped by some means or other. Seymour told

me that he was urged into all that he did, and seemed to lament that he had engaged at all. Two parties went after Morgan—the first time nothing was accomplished—the second time they brought him in.

*Mr. Whiting* asked the Court if it was not competent for Sibley to disclose the names of the two persons alluded to in his examination, as concerting to suppress Morgan's book.

*Mr. Sibley.* The gentleman alluded to yesterday from Batavia, was Chauncey C. Church; and the Canandaigua gentleman was Nicholas G. Chesebro; have not had conversation with any others upon the subject. Church told Chesebro that Morgan would go on with the book unless measures were taken to stop it. Chesebro said the thing must be stopped and Morgan must be taken care of—Church did not assent or dissent—heard no other conversations about carrying Morgan off—heard Hayward say he was bound by his oath to go after Morgan—did not see Smith or Whitney here in September.

*Cross-examined.* Church is a silversmith, as also am I. Church used to work for me as a journeyman—don't know when or how the story came out about Morgan's going only to Tennessee river. Seymour said he was urged to go to Batavia, that Hayward was along; in all transactions subsequent to Morgan's confinement, he spoke of them as "they." Howard said there was no harm in riding out and back if Morgan was in the carriage; heard the several facts of Morgan's being taken from jail, but did not know the particulars until Seymour told me.

The person who urged Seymour to go to Batavia was Chesebro—Seymour told the story without saying that any person had told it to him.

*Harvey Olmstead.* Lived in Greece, Monroe county, near Handford's Landing; about the middle of September saw a carriage standing in the road between daylight and sunrise, a little south of F. Handford's Tavern; the curtains were closed down; the horses were much fatigued; a man was on the box; afterwards saw the same carriage under Handford's shed; saw no persons in the carriage; when the carriage returned from off the ridge in about three-quarters of an hour the curtains were up and four or five persons got out; the driver was a small man—a stranger to me; the carriage was yellow.

*Joshua Christopher.* Lived in Rochester in September last; know Hiram Hubbard; saw him in Rochester just before breakfast, about the middle of September—it was the next morning after Morgan is said to have been taken from Canandaigua; he drove grey horses; have spoken to Hubbard about it several times, but he said nothing of any importance.

*Cross-examined.* Keep a public house. Hubbard said he had been driving all night. Hubbard has always said he did not know who was in the carriage; it is not common to ask names of persons who want carriages when drivers are sent.

*Ezra Platt.* Live at Rochester and keep a livery stable; cannot say whether I hired a carriage and horses on twelfth of September; about the time of the installation at Lewiston

some person came before daylight to my house—woke me up and inquired whether I had horses and carriages to let; answered that I had, and inquired where it was wanted to go, and got the impression that it was wanted to go to Lewiston to the installation of a chapter but can't recollect the precise words; was told to send the carriage to Ensworth's; called a driver, told him to harness a team and take it to Ensworth's; can't recollect who the driver was; believe it was Parker or Parkhurst—don't know where he is now; it was a yellow back with bay or black horses; supposed that the grand officers who went to install the chapter had it; now think I was imposed upon; have never been paid for it; don't know whether I ever asked who rode in it; don't know how far horses or carriage went; don't do business that way generally.

*Gen. Marvin.* We again offer to admit all that is charged in the indictment, but deny that the defendants upon trial were parties to the outrage so abundantly proved.

*The Court.* We cannot interfere with the course the public prosecutor thinks it is his duty to pursue. The testimony is admissible to prove a conspiracy, and if he is not willing to take your admission, it must proceed.

*Solomon C. Wright.* Lived at New Fane, on the Ridge Road in Niagara county, on the twelfth of September; saw carriages pass that day; saw one in particular, which was driven into my barn—this one arrived in the afternoon, and baited, and left there after candle-light; did not see any passengers in it

or see any get out of it, a person got some horse feed and some men got supper there that night; don't know who they were, how they came there or how they went away or what they were doing there; they came and went about the same time the carriage alluded to came and went; did not expect a party there that night, don't know William Morgan; some man not the driver called for the horse-feed; Jeremiah Brown was about there sometime during the stay of the carriage, and went away about the same time; don't know whether he went away in the carriage or not; did not see Eli Bruce there that day; all who eat came into the house.

*David Maxwell.* Am gate keeper on the Ridge Road; recollect a coach passing the gate on evening thirteenth of September, about 10 o'clock; live about eight rods from Solomon C. Wright's tavern; heard a buzz upon the hill near the gate and then heard a carriage pass; opened the door upon Jeremiah Brown, and said how do you do Capt. Brown, but received no answer; Capt. Brown handed a shilling which is the toll on a two-horse coach; asked Brown what is the matter, who answered "nothing," and passed on; Brown came back in a coach the next morning about sun-rise; this gate is nineteen miles from Lewiston; saw no other coach pass on the thirteenth.

*Eli Bruce.* Am Sheriff of Niagara county. (To a question whether he knew Jeremiah Brown, *Mr. Bruce* appealed to the Court for protection against questions that might tend to implicate himself.)

The COURT. The provisions

which under all circumstances protect witnesses from being brought into difficulty by their own testimony is the most excellent one in our system of criminal jurisprudence, and this court will at all times endeavor to preserve it strictly. We will judge of the propriety of the questions as they are put and see that the witness is not entrapped by improper questions.

*Mr. Bruce.* Know Jeremiah Brown. Was at Wright's tavern on the thirteenth September last; saw Burrage Smith that afternoon; was at Lewiston on fourteenth September—was not at Fort Niagara on fourteenth, fifteenth or sixteenth.

*Mr. Whiting.* Were you at the Fort on thirteenth September?

*Mr. Adams* objected.

The COURT said that it was for the witness to object to the question.

*Mr. Adams* presumed it was competent for the witness's counsel (in which relation he had the honor to stand) to object to the questions. It was presumable, he said, that counsel understood the legal rights of witnesses better than they could know themselves.

The COURT. The objection is sustained.

*Mr. Bruce.* Was at Rochester or Canandaigua in September, and never saw Loton Lawson, except in the jail of this county. Decline to say whether I knew William Morgan.

The COURT decided that witness was not compelled to say whether he heard conversation about Morgan on the thirteenth of September, and to the question whether he saw Morgan at



Wright's tavern *Counsel* interposed and advised him not to answer any further questions.

*Mr. Bruce* stated to the court, in explanation, that he had been twice examined on charges relating to this affair, and that it was a subject of complaint against him to the Governor and that thus situated he did not know how far it would be proper for him to answer. *Mr. Adams* added that he understood also that the Grand Jury of that county had just found a bill of indictment against *Mr. Bruce* upon the same complaint. It would be unjust and illegal, therefore, to pursue the examination.

The *District Attorney* waived the question, and called

*Corydon Fox*. Lived in Lewiston in September; drove a carriage to near Fort Niagara; it was eleven or twelve o'clock when we started; was in bed when Maj. Barton called me to hitch a pair of horses; *Mr. Bruce* came and told me to drive around on the back street; drove on the back street near a carriage; one or two men were standing near it; one got out of the other hack into my hack; three or four more got in; my horses were restless and I had to pay attention to them; no horses or driver were with other hack; drove down to Youngstown; stopped at Col. King's; King got into the coach; then went down by the burying ground near the Fort; there I stopped and all of the party got out of the hack and went towards the Fort. I asked if I should wait; they said, "No, go back about your business." It was *Bruce* that said so; only knew *Bruce* and Col. King; did

not see anyone that was bound; heard some person ask for water at Col. King's; don't know whether water was got or not.

*Ebenezer Perry*. Live at Lewiston; on fourteenth September heard a noise at Barton's stage barn, about one o'clock in the morning; went to the door; saw a coach coming towards another coach without horses, with Fox and Bruce on the box; Bruce went to the other coach and opened the door; a man came out, turned round and reached back into the coach; a man in a helpless condition was taken out of the coach by Bruce and another man; they walked along to Fox's coach and got in, all except Bruce, who walked to the first coach and took out a jug which he carried to Fox's coach; supposed the man they helped was intoxicated; was confirmed in this opinion by the sight of the jug. They all got into the coach and started off towards Youngstown. The helpless man seemed to have a handkerchief bound round his head; had no hat on; recognized Bruce the next day at Lewiston.

*Daniel Weaver*. Had some conversation with Harris Seymour last January at James Everingham's store. A man came in to see his account. Seymour says, "I won't have a Bloomfield man or a Quaker on my jury." Seymour said he would go barefoot and bare-legged through the snow, from here to New Orleans, through jeopardy, to do the same thing over again; told Seymour (alluding to the Morgan affair), it is a bad business; the answer was, if you had a full Quaker jury they would do justice.

*Mr. Adams* (to the jury). The illness of one of the leading counsel for the defendants has cast upon me the duty of opening the defense; and as I had not expected to be called upon to address any remarks to you in the course of the trial, I beg leave to bespeak your indulgence, if in discharging my duty, I should be somewhat desultory. If the jury, or the respectable and anxious defendants, expected that any part of the defense consisted in denying that the offenses charged in the indictment had been committed by some persons, they would be disappointed; and if anyone expected that the defendants' counsel were about to deny that many of the Free Masons, and the defendants, among them, had wished to suppress the publication of Morgan's book, he was to be disappointed. Whether such a wish was criminal, was immaterial to the legitimate purposes of this investigation. Their counsel are free to admit that a nefarious conspiracy had been formed to kidnap Morgan; and that he had been violently carried away, under circumstances which had called forth the virtuous indignation of the country, and the counsel for the defendants, and the defendants themselves, hoped that this indignation would be directed against the proper objects, until all the offenders should be brought to punishment. We only deny that the defendants had participated in the guilt of these transactions. If this were an ordinary prosecution, carried on under common circumstances, the defendants' counsel would only feel called upon to repose the case of their clients on the insufficiency of the proof on the part of the People; for although much had been proved, which commanded the earnest attention of the jury, very little had been done to sustain the charges set forth in the indictment against the defendants. It was natural that in listening, as they had, to the whole history of the outrages committed upon Morgan, they should lose sight of the real subject of inquiry before them, namely, the charges contained in the indictment against these defendants. The real issue to be tried was, are the defendants guilty of what is alleged? To this I beg leave now to call your attention. The jury would remember that the only acts proved against the defendants con-



sisted in what they had done in relation to bringing Morgan from Batavia to this place on criminal process. For this transaction they had, some of them, been tried and acquitted—and besides, unless this was done, as a part of a concerted plan to carry him away from jail, it did not involve them in the guilt here charged. Something had been shown of the declarations of Mr. Seymour, respecting his knowledge of the foul means by which Morgan had been removed, and of the fate of the unfortunate man; but on understanding the imposing statement of the witness, Mr. James Sibley, it appeared that Mr. Seymour was only relating what he had learned from others after the dark deed had been done—except in so far as related to bringing Morgan from Batavia. A knowledge acquired after the commission of these crimes did by no means imply guilt in Mr. Seymour: he might have been stating what was rumor, and what many persons might have related; and even if he had derived that knowledge from some suspected and guilty person, by the use of that key which unlocks the bosom of a brother, it did not implicate him in transactions of which he had no knowledge at the time. He might have availed himself of the relation in which he stood to such person, and have drawn from him this appalling relation, for the purpose of gratifying the same curiosity which prompted Mr. Sibley in his inquiries, and he might have had in view the further and higher purpose of rebuke and admonition. I am instructed to say, that the defendants will show to the entire satisfaction of the jury, that Morgan was brought from Batavia with no other motive than to have him punished for a petit larceny, of which the defendants had good reason to think him guilty. It was well understood that Morgan was about to publish a book which would bring dishonor on the society of Freemasons. The defendants were members of that society, and with many others doubtless wished to have Morgan convicted, if he was guilty, that his infamy as a man, and his treachery as a Mason, might make their way together in the community.

The defendants would further show, that the plan of bringing Morgan from Batavia was originated and the process pro-

cured for his arrest by other persons, without their knowledge; that a coach was hired and they invited to ride before they knew the object of the journey; that with the exception of Mr. Hayward, the constable, they had nothing to do with his arrest, detention, conveyance, or subsequent examination and discharge before the Justice. That his still subsequent arrest for debt, and commitment to jail on the execution, was by the sole procurement of Chesebro, when they were at their homes and without the least knowledge of what was doing; and that his abduction was still an after thought, suggested by persons with whom the defendants had no communication, and executed while they were quietly pursuing their ordinary avocations and enjoying at places remote from the scene of violence the society of their families and friends. The defendants will further show such explanations of the evidence on the subject of the Batavia expedition, as will remove whatever suspicions may have been attached from that quarter; and on the whole I feel assured that I shall hear from the eminent and faithful counsel for the prosecution, expressions of gratification at the verdict of acquittal which you will return.

I ought not to sit down without adverting again to the great excitement which these outrages had produced, and which had pervaded the community. The indignant feeling that had burst forth and spread with such rapidity was honorable to the country; and while directed against its proper objects, should not subside. But the honest and righteous zeal to vindicate the majesty of the laws and to punish the guilty might be perverted to the unworthy purposes of a political or personal nature, and when so perverted, it would become dangerous. The jury have seen here and elsewhere sufficient to admonish them that they ought to see to it, that their understandings are not surrendered to, or even influenced by, this feeling. A number of the respectable free-holders, who had been returned on this panel, candidly declared here in court that they had formed an opinion that the Freemasons of this vicinity as a body were concerned in these outrages. In such a state of feeling, when there was so much eagerness to convict some-

body, there was great danger, that, to be suspected, would be to be convicted. The most sanguine hopes of their counsel would be realized if the innocent persons who had fallen under suspicion should escape unjust conviction and punishment. But on this subject counsel and the defendants themselves looked with confidence to the Court for its advice to the jury, trusting that such advice would be received with the great respect to which it would be entitled.

#### WITNESSES FOR THE DEFENSE.

*Mrs. Sally Griswold.* Reside in the family of Mrs. Seymour, mother of Harris Seymour; saw Harris Seymour on the evening of eleventh of September from candle lighting till ten o'clock, at Mr. Phelps,' where I watched with old Mrs. P. who died that night—Charles Seymour was of the party.

*Charles Seymour.* Recollect a party on the evening alluded to by Mrs. Griswold; my brother Harris was with the party till it dispersed; Miss Clark, Miss Cevon and Mrs. Everingham were of the party.

*Peter A. Worden, Thomas Neale, and Austin Wilder* swore that Mr. Howard was engaged in the store all the evening of the twelfth of September.

*Joseph M'Millen.* Roberts and I worked for Chesebro; found Roberts in bed on the evening twelfth of September, about eight; do not know where Roberts went the day before.

*Maj. Gen. Brooks and Maj. Wm. Blossom* testified that Holloway Hayward was at military reviews at Bristol and Bloomfield on eleventh and twelfth of September last.

*Johnson Goodwell.* Was in Batavia the morning Morgan was arrested; went to Darnold's

just as Morgan had got into the coach; Miller went to the coach door much agitated, and said you must not ride in that coach as I am your bail; Morgan said he was arrested on a criminal process and must and should go and satisfy the people in Canandaigua that he was not guilty; Morgan said you are not holden when I am arrested on a criminal process; Miller said where in hell are you going; Mr. Darnold closed the coach door, but saw no scuffling; Miller inquired by what authority they took him off; Hayward answered I have a warrant for larceny; Miller said he should endeavor to stop him; Hayward said he should take Morgan. Saw no violence; did not see Morgan rise up in the coach; never heard any one talk about suppressing Morgan's book. Am a Free Mason; the book Morgan was writing was considered disadvantageous to Masonry.

*Timothy Hosmer.* Live in Avon; a party called at my house on eleventh of September and got some refreshments; no restraint was exercised upon Morgan; party was there an hour; don't recollect who paid for the refreshments.

*Jeffrey Chipman* (recalled).

Don't recollect that any particular house was mentioned where Morgan was to be found; Chesebro said Morgan was about six miles off; don't recollect that Chesebro or Lakey said that Morgan was not a Mason; Chesebro told me to put his (Chesebro's) name into the process; I gave criminal process to Hayward generally; I am not a Mason; the warrant was directed to the Sheriff, any of the constables, or Nicholas G. Chesebro.

*Ira Wilder.* Was bail for Ackley who had got into bad habits; they took possession of the house from Ackley till the nineteenth of August; the accounts were handed over up to August, but there was none against William Morgan there; an account of \$2 was put upon the schedule after it was left at Justice Chipman's.

*Nicholas G. Chesebro.* Received a warrant against Morgan in September; handed it to Hayward to be served; had no conversation with defendants about taking out that warrant; went with the officer and these defendants to Batavia; they all went at my invitation; asked Howard to take a ride, who said he would if he could be back that evening or next morning; said nothing to him then about Morgan; when I took out the warrant I believed Morgan would be convicted of larceny; spoke to Harris Seymour about going to Batavia; Seymour said he had business at the bank in Rochester next day, and if he could get round from Batavia to Rochester he would go; requested Roberts, who is his foreman, to go also to Batavia; asked the defendants to go merely for a

ride; called for Howard at his home; had no previous conversation with defendants; had no other design upon Morgan at that time, than to convict him of larceny; defendants took no part in the arrest of Morgan (except Hayward), the other defendants were in bed; Morgan was not bound, and was treated indulgently; Seymour and I got out at hotel; did not see defendant at the examination of Morgan; was informed that Morgan was discharged on the charge of stealing; when I presented a demand for \$2, upon which he confessed judgment; can't say whether the \$2 demand was put upon the Ackley schedule before the criminal process was issued; Morgan's name had in September become notorious; never conversed with any of these defendants about removing Morgan from jail; was informed that Morgan would go away peaceably; was told that Morgan had agreed to go away; defendants had no agency in removing him; knew Morgan was about to publish a book, and wished to separate Miller and Morgan, but did not intend a violent separation; understood that Morgan wanted to get rid of Miller and discontinue his book. The conspiracy to take Morgan west from the jail originated here after Morgan was discharged from the criminal charge. As a Mason I wanted to suppress the book; did not anticipate any force or resistance in taking Morgan from jail; it was nearly night before Morgan would consent to go from the jail; requested driver to go fast from Batavia; saw Miller at Darnold's; he threatened to pur-

sue Morgan; went and returned to and from Batavia in a usual public manner; James Sibley introduced Mr. Church of Batavia to me in September, either Sibley or Church mentioned the subject of the book, but little was said; nothing was said about removing Morgan in that conversation; no plan was agreed upon.

*Cross-examined.* Think there was conversation about Morgan's being at Lima; took the stage for Batavia; told Howard the object of the visit to Batavia; perhaps I told it to all; was induced to engage in the business, to suppress the book; had heard that Kingsley accused Morgan of stealing; can't say whether I asked Kingsley to complain; told Howard I had a warrant for Morgan; told all the party that I had a warrant for Morgan; I hired the carriage, and paid \$10; told defendants my opinion that Morgan's conviction would derange the publication; did not know Ganson before; don't think I talked with Ganson about Morgan; did not know Dr. Butler; staid at Darnold's; did not see Church; went out with Hayward, but did not see Morgan arrested; left Darnold's and drove fast; Ganson indemnified the stage driver; got here before sundown; demanded \$2 of Morgan for which Morgan confessed judgment; heard Morgan was a worthless, intemperate man; got the examination against Morgan to punish him for writing the book; gave no directions to Hayward; the first idea of removing Morgan from jail was on the evening of eleventh; several persons said they would go away

with Morgan; was told at Batavia that Morgan was anxious to be kept away from Miller; supposed if Morgan went among his friends at Rochester they would induce him to stop the book; after he was put in jail, on debt, his friends at Rochester were informed that he was here; understood he had lived at Rochester; understood that Morgan said that if the debt was paid he would go with them; don't know who paid the debt; saw Cole, Sawyer, and Lawson about the jail; got the impression that the persons who took Morgan away were from Rochester; got no information that I can rely upon as to what became of Morgan; my object was to suppress the book; did not intend going to Rochester when I started for Batavia; Ganson was probably apprised of my object with Morgan.

The COURT. Chesebro, I now ask you a question, under the solemn responsibility of the oath you have taken; were these defendants, or either of them, by words, significant signs, hints, writings, or in any other manner, apprised of the intention to take Morgan from the jail of this county? A. They were not.

The Counsel for the People and the defendant, after consultation, concluded to submit the case to the jury under the charge of the Court without argument.

JUDGE HOWELL. I wish that counsel would sum up, as I feel too much exhausted to go through with the testimony at this late hour. The reading of my minutes alone would consume more than an hour. Counsel declined.

THE JUDGE'S CHARGE.

JUDGE HOWELL (to the jury). The counsel, by declining to sum up the cause, have thrown a very unexpected burden on my hands, and they must not complain if I should fail to notice the whole of the testimony as fully as they might desire. The crime with which the defendants stand charged by the indictment is one of very great enormity. They were charged with having formed a wicked conspiracy to seize a citizen, under the protection of our laws, and enjoying the rights and entitled to the privileges of a free man, and without authority to transport him from the gaol of Ontario County to foreign parts, and there to secrete and imprison him; and with actually having carried into execution this conspiracy. The counsel for the defendants had cautioned the jury against the influence of popular excitement: it was true that great excitement had prevailed, and the Court rejoiced that it was so—the crime was one that ought to call forth the indignation of all virtuous citizens, and it was to be hoped that the excitement would never cease until the actors in this dark, and probably tragical affair, are brought to light, and the guilty punished. At the same time the jury are bound to divest themselves of all passion and prejudice, and to know nothing of this cause but what they derived from the testimony given them in the box where they are sitting. (The JUDGE defined a conspiracy and commented on the nature of the evidence by which it must in most cases be established.) It was not to be expected that a secret and wicked combination could be proved by producing the original compact, but by showing the acts of many individuals, acting in concert, all tending to the same unlawful end. The first question to be determined by you, under the first and second counts, will be, has such a conspiracy as that charged in the indictment been proved to have been formed by any person whatever; and if so, are the defendants on trial, or either of them, parties to it?—the second, are the defendants, or either of them, guilty of kidnapping and imprisoning Morgan, as charged in the two other counts?

As to the first question, the evidence produced on the part of the prosecution establishes most conclusively the fact of the conspiracy between certain persons; and it then becomes the important question, whether either of the defendants were parties to it. The prosecution do not profess to offer any direct evidence of such participation, but would infer it from the acts of the defendants. It then becomes important to bear in mind the precise object stated to have been designed by the conspiracy charged in the indictment, to-wit: the carrying of Morgan from the gaol of Ontario County, and to inquire what acts of the defendants tend to accomplish that object. It is not contended that any direct agency had been proved against any of the defendants, either in removing Morgan from gaol, or in his subsequent imprisonment. It has indeed been fully proved, that he was violently removed from the gaol at Canandaigua, and carried by night as far as the Ridge Road beyond Hanford's Landing, in Monroe county, and that he has not been heard of by his family or friends since that time. And although not so clearly proved, yet the evidence leaves but little room to doubt that Morgan was carried in the same unlawful manner to Lewiston, and from thence down the river to the burying ground near Fort Niagara—and from that period his fate has not been disclosed—whether living or dead, no one has informed us. But were either of the defendants engaged in his abduction? Some of them have proved conclusively, and others very satisfactorily, that at the time of Morgan's abduction, they were engaged in other places about their ordinary business, and it does not appear that they had subsequently engaged in it. Did then any of the acts or deliberations of the defendants satisfy the jury that they had entered into the conspiracy to remove Morgan from the gaol? If the jury, after carefully examining all these, should have any reasonable doubt of the guilt of the defendants, they must acquit them; but if from all the evidence, you are satisfied that the defendants had been parties to the conspiracy charged in the indictment, or had participated in the unlawful abduction and imprisonment of Morgan, charged against them, then

you must fearlessly pronounce your verdict of guilty, however distressing the consequences may be to the defendants.

**THE ACQUITTAL.**

The *Jury* retired and after an hour's consultation returned a verdict of *Not Guilty* as to all of the defendants.



## THE TRIAL OF WILLIAM DANDRIDGE EPES FOR THE MURDER OF FRANCIS ADOLPHUS MUIR, PETERSBURG, VIRGINIA, 1848.

### THE NARRATIVE.

On the morning of February 2, 1846, Francis Adolphus Muir, a young man of one of the leading families of the State of Virginia, rode on horseback to the plantation called Grampion Hills, belonging to his neighbor and friend, William Dandridge Epes, also a member of a Virginia family, numerous, wealthy and respectable. Five years before Muir, as the executor of his father's estate, had sold the plantation to Epes, who had given bonds and a deed of trust to secure part of the consideration. He had not been able to pay these as they fell due and had been more than once pressed by the executor, who finally informed him that unless paid by Christmas, 1845, the land would have to be sold under the deed of trust. But he was ill at Christmas time and he had put off the demand several times by promises of money, which he failed to obtain, and now Muir, being unwilling to grant any further forbearance, journeyed to the Epes house with the bonds in his pocket to demand payment and to inform the debtor that the next step would be the sale of the place by the Sheriff. Muir left his brother John's house with that statement, promising to return the next day. A servant on the plantation saw the debtor and creditor ride off together from the Epes residence, but Francis Adolphus Muir was never seen alive again. Diligent inquiries were made in the neighborhood, but to no purpose. A little later, John Muir received a letter from Petersburg, a town near by, signed F. Adolphus Muir, which said that he had collected the debt from Epes, and on his way from the plantation to Petersburg his horse had thrown him and a stranger passing by had taken

him in his buggy to the town. A friend was writing the letter for him, as he could not write himself on account of the injury, and just as soon as he could he would go North to buy a stock of goods with the money he had collected. A week later John Muir received another letter signed by his brother, dated New York, but posted at Petersburg, which said he had left Petersburg with his head and soul full of business and anxious to get rich quickly, but when he got to New York he found that there were better chances in Missouri and he would go there. He asked pardon for not stopping to see his relatives on the way, but he had seen them lately and it would be childish to do so when his business was so urgent. A gentleman whom he had met in New York had promised to take the letter to Petersburg and post it there for him to save postage.

Three months later—during all of which time the search for the missing man had been kept up, though for some time Epes was not suspected—another and extraordinary epistle was received by John Muir, dated also from Petersburg and signed James P. Rollins. The letter stated that the writer lived in Texas, was going back there in the morning, but as he had learned that there were people here who were looking for Adolphus Muir, he wished to say that he had met a man of that name a few weeks before in Texas whom he had seen before in Missouri; that he evidently did not wish to be known, for he was going under an assumed name. Later he had met him in New Orleans and a day or two after a black hat was picked up in the river and on the lining was the name F. Adolphus Muir, Dinwiddie, Virginia. He had not heard of him since.

During this time Epes had maintained that he had paid the bonds on the day of Muir's visit and he exhibited the bonds receipted by the executor. And he had more than once suggested that Adolphus had perhaps gone off with the money for the purpose of defrauding the other heirs. Suspicion at length was directed to him, the signature to the receipts was questioned, and finally a watch which was worn by Muir when he left for Grampion Hills was found in a jewelry shop in the

town and the jeweler identified Epes as the man from whom he bought it. Then it was discovered that Epes was in Petersburg at the time when the letters were mailed from there; and finally the neighbors concluded to investigate at Grampion Hills. A committee was appointed, which went to Epes, told him he was suspected and asked his permission to search the premises. The next day, though no trace had yet been found of the body, it was decided to arrest Epes, but he had fled.

Further search was made and on July 15, 1846, the body of Muir was discovered on the Epes plantation buried a few feet below the ground in a grove of trees about half a mile from the residence. Though much decomposed, it was easily identified, and wounds in the back and the front from a shot gun were found to be the cause of the death.

In February, 1848, Epes was arrested in Texas, and brought back to Virginia, making on the way a partial confession of his guilt to the Sheriff's officer.

In September, he was indicted and tried for the murder. The evidence was very strong on all points, but his lawyers fought strenuously for his life. But he was convicted and on December 22 he was hanged in the presence of a great multitude of spectators from every part of the county. Before his execution he made a full confession of his crime.

#### THE TRIAL.<sup>1</sup>

*In the Circuit Court of Law and Chancery for Dinwiddie County, Virginia, September, 1848.*

HON. JOHN W. NASH, *Judge.*

*September 19.*

An indictment had been previously found charging the prisoner with the murder of Francis Adolphus Muir. It con-

<sup>1</sup> *Bibliography.* \*"Trial of William Dandridge Epes, for the Murder of Francis Adolphus Muir, Dinwiddie County, Virginia. Including the Testimony Submitted in the Case, the Speeches of Counsel, etc., to which are added the Confessions of the Prisoner, an Account of his Execution, etc., etc. Petersburg, Va., J. M. H. Brunet, Reporter. 1849."

tained two counts, the first charging that the deceased was killed by a gun-shot wound received in the back just above the hips, the second that he came to his death by a bullet wound in his hips. The prisoner being placed at the bar, pleaded *Not Guilty*.

*David May* and *Thomas S. Gholson*,<sup>2</sup> for the Commonwealth. *William T. Joynes* and *Thomas Rives*,<sup>3</sup> for the Prisoner.

The panel being called, the rest of the day was occupied in selecting the jury.

*September 20.*

The jurors were selected to-day by lot. They were: George Williamson, Edward Williamson, Hartwell W. Williams, Thomas Perkinson, Hartwell Wells, Daniel M. Jolly, Edmund Haddon, Thomas Warren, John S. Hardaway, John F. Young, John Major, James H. Chappell,

*September 22.*

#### WITNESSES FOR THE COMMONWEALTH.

*John A. Muir.* In 1841 there was a sale of my father's estate, the land was advertised to be sold for one-third cash, and the balance in one and two years, with a deed of trust on it. My brother Adolphus stated before the land was sold, that if it would be any inducement the credits would be extended to one, two and three years, if buyers wished; no one asked it, and he considered it sold upon the terms advertised. When my brother (the acting executor) came to have a settlement with him, Epes claimed the one, two and three

years' credit, which my brother would not allow. But as Epes would not settle in any other way, brother concluded to concede rather than take the land back. Epes several times promised to settle, but did not; finally, brother told him he would sell him out if he did not pay. Epes then promised to pay at Christmas, 1845. Brother went to see Epes at Christmas, but could not, as he was confined to his bed. On the second of February, 1846, brother left my house to see Epes, and have a settlement; he promised to re-

<sup>2</sup> GHOLSON, Thomas Saunders. (1809-1868.) Born at Gholsville, Va. Graduated University of Va. 1829. Judge Circuit Court 1853. Member Confederate Congress.

<sup>3</sup> RIVES, Thomas. Born Nelson County, Va., 1806. Member Virginia State Legislature 1835-1861. Judge Supreme Court of Appeals of Virginia 1866-1869. United States Judge Western District Virginia 1871.

turn to my house that night, and stay with my wife, as she was alone. I started for Petersburg the same morning, and he was to remain at my house until I returned on Wednesday. On Wednesday, fourth, started home, and met Epes about seventeen miles from Petersburg. He said that he called by my house that morning, expecting to meet with my brother, and they would go to town together, as he had promised to meet him in Petersburg on that day, but found the house all shut up. Told him brother had said he could not stay more than one night at my house, and I expected to have met him at Mr. Boisseau's on Tuesday night; when I got home and found he had not been there, I thought it very strange, as he had promised to return. Epes then said that he parted with him at his out-gate on Monday, and said brother told him that he had some business in Brunswick, but would meet him in Petersburg on Wednesday. Epes went to Petersburg and when he returned brought me a letter dated fourth February, 1846, about eight days old, telling me pretty much the contents before I read it. It said that as brother was going to town his horse threw him and got away, sprained his right hand so much that he could not use it, and he had to get a friend to write that letter for him, and said, fortunately for him, a gentleman came along and offered him a seat in a buggy to Petersburg, which he accepted, and also that he had an offer of going into business in Petersburg, and would leave immediately for the North, and that Capt. Epes had

paid every dollar that was due upon the land. Asked Epes if my brother told him what kind of business he was going into. He said no; said he met him near Jarratt's Hotel, went up to his room, had a settlement, after which he had very few words with him, as he (brother) appeared anxious to get off. He afterwards met brother, who handed him this letter, and requested him to forward it to me. The letter was sealed; was in the woods where the negroes were at work when he handed it to me. Brother did not have any clothes with him except what he had on, he left his saddle-bag at my house, and his trunk was at Mr. Boisseau's. On Tuesday, tenth February, Mr. J. W. Bailey sent a horse to my house by his son (which was found in his field the day before), to know if I knew whose horse it was; told his son I thought it was Mr. Boisseau's; it proved to be Mr. B.'s horse, and the same which my brother rode from his house; received another letter dated New York, February 12, 1846, mailed in Petersburg; in that letter there were two notes enclosed to me, one on Capt. W. H. Cousins, the other on Mr. Berthier Bott. About the last of April, Epes came to my house for the purpose of getting a release deed; we went to Capt. Cousin's, and there signed the deed; he showed me the bonds and receipts; was satisfied they were the same bonds that he had given for the land; was not as particular in examining them; received another letter signed Junius P. Rollins, dated Petersburg, May 23, 1846; did not suspect foul play until I got this

letter; when I got to my house told my wife brother was murdered, and that Epes was the man. On eighteenth of June Mr. Boisseau came to my house, and next morning we went over to Epes to inquire about brother; he was not at the house; his wife said he was out with the negroes; but the overseer sent word that he had rode off; as we passed by a place called Moore's (a place on Epes' land) we saw his dog come out of the pines, and the thought struck me he (Epes) had been to the place where he had concealed the body; did not see Epes then. Saturday morning he came to my house after breakfast; Captain Cousins was there; he and Epes were talking together; told Epes of our visit to make inquiry about brother, as I intended to trace him as far as I could and he was the last one who had seen him. He said he knew nothing more than he had already told me, that is, that he parted with him at his out-gate, and met him in Petersburg on the fourth, and had a settlement with him; asked him how much money he paid my brother; he said, including interest, over \$3,200. He thought some one must have killed him, or he had acted the rascal and run off with the money, that there were many persons who would kill another for \$5. I asked him if he ever had any reason to think he would act the rascal? He said, no, he never had. He then told of a hat being picked up on the Mississippi, and said, it was frequently the case, a man in traveling would lose his hat, and they would not stop to get it. Do not think Epes could have heard of the contents of that let-

ter then as I had only mentioned it to a few of my particular friends. Though firmly believing he had murdered my brother, was unwilling suspicion should fall upon him until I had investigated; about the last of June I went to Petersburg; inquired at railroad and steamboat offices to find if he had left by any public conveyance, found no trace of him; none of his intimate friends had seen him any time in February. Went to Richmond, made the same inquiry, with the same result; returned home convinced that Epes was guilty; the following Tuesday heard that Epes had traded a watch in Petersburg. My brother had his watch with him at my house on Sunday, first February. On ninth July a number of the neighbors met at Captain Cousin's mill, a committee was appointed to search and to tell Epes that we had concluded that he was murdered in the neighborhood, and he was the man. It asked his permission to search the premises, but had to ask him the second time before he consented. He straightened himself, and said he did not fear hell, death, or the devil. Dr. Edwards asked him if he would not go in the search; he said yes, and went; asked him if he had those bonds with him; he said he had; requested him to show them to the company; he did so. The bonds had their names torn off, and one of the bonds had a receipt on it which I told Mr. Boisseau was forged. Epes requested Mr. Booth to call Mr. Boisseau and myself to him, and told us he would pay the bonds again without a suit. We

searched the woods and fields; we went to the house and examined the wells; and Epes got the key to the ice-house and insisted that we should examine it, saying, perhaps he is secreted there, if we thought him d—d rascal enough to commit such a deed. Some one took the key and examined it. After the watch was found Wednesday we went over to Epes to arrest him; but he had left Monday morning.

*Benjamin J. Vaughan.* Am Sheriff of the county of Dinwiddie; have seen Mr. Epes write, and was well acquainted with his writing; have particularly examined the letters handed. On the first letter, that dated fourth of February, the hand-writing is evidently disguised; believe the hand-writing of the letters is that of the prisoner.

*Charles Corling.* Never saw

Mr. Epes write; received letter from him which I have compared with these, and there is a very strong resemblance. Am a druggist in Petersburg.

*Claudius P. Bevil.* Had a great many business transactions with Mr. Epes, had examined these letters at the examining court, and believe every one to have been written by him.

*Perry L. Derby.* Do not remember having seen Mr. Epes write. Have seen his name signed. Have frequently received orders from him. I am a shoemaker. The orders were for shoes; believe myself well acquainted with his writing; have examined these letters—at the previous court—believed them then, and believe them now, to be in the same hand-writing.

*Mr. May* then read the letters, as follows:

(1st.)

. Dear John:

Petersburg, Febry. 4, 1846.

I have arrived in this place and will give you a small sketch of the times. On my way here my horse threw me, sprained my right hand and got away from me, my hand is at this time so painful I am obliged to get a friend to write this letter for me. I hope my horse has returned either to your house or Peter's. Fortunately for me a gentleman came along in a buggy and offered me a seat to town which I accepted. Capt. Epes has paid me every dollar due upon his land, etc. I have had an offer to go in business in this place. I shall leave immediately for the north where I shall remain for several weeks and see the prospect of laying in a stock of goods. I shall not be in your part of the country for several weeks. My love to all.

Your brother,

F. ADOLPHUS MUIR.

Mr. John A. Muir,  
Dinwiddie.

(2nd.)

Dear John:

New York, 12th Febry., 1846.

With a bad pen and my hand still very sore I attempt to write you a few lines as follows: I left Petersburg in a very great hurry



when there last with my head, body and soul full of business, calculating in a very short time to possess an estate almost equal to Old Girard, but my prospects were soon blighted. A short time after reaching here I met with a gentleman from Missouri; an acquaintance of our relations of that place, informing me that they were getting on rather slowly, etc.—perhaps would be glad of money. I have, therefore, thought it best to go to Missouri and see them and supply their wants and return to Old Virginia probably next fall. I shall start immediately. It would be but little out of my way to call on you all, but having seen you so recently, I have thought it unnecessary to be so childish. I shall travel the greater part of the route by private conveyance. You find this letter mailed from Petersburg. I met with a gentleman on his way to that place by whom I sent it with a request for him to have it mailed in Petersburg to Old Darvills. The postage was small to be sure but I thought had as well be saved. Enclosed you find all the papers I had with me which you can manage to suit yourself. After reading this enclose it to Peter so as to let him know of my intentions. I expect he thought strange of my not calling at his house on my way to Petersburg, but I could not do so on account of being in a buggy with a stranger. My sincere love to you all in haste.

Your brother,  
F. ADOLPHUS MUIR.

To Mr. John A. Muir,  
Darvills, Dinn.,  
Va.

Postmarked (5)  
"Petersburg, Febry. 26, Va."

(3rd.)

Sir:

Petersburg, May 23, 1846.

On my arrival in this place I inquired if any of the family of Mr. Gustavus Muir still lived in Virginia. I was informed of your name and residence. Altho a stranger to you I have taken the liberty to address you on a subject by no means agreeable to either of us, but think it my duty to do so. I am a Virginian by birth and have resided in that state until a year or two past. I moved to Arkansas, from there to Texas where I now live, and shall leave for home this morning. I became well acquainted with F. Adolphus Muir, whom I understand to be a brother of yours, while he lived in Richmond. I also saw him while he lived in Missouri, and on my way to this place I met with him at Orleans. I immediately addressed him as Mr. Muir. He called me by name but seemed to be much confused, and immediately left the room; a friend of mine was standing by who asked me if I was not mistaken in that gentleman's name. I told him I was not; that I had known him well for years. My friend then remarked that in the month of February last that they traveled together from New York to Orleans, and he certainly traveled under a fictitious name—which name I cannot think of at this moment. He said he seemed to have plenty of money, and said his object was to



go in business in Orleans. Why he should have changed his name I am unable to say. On the next morning after I met him a black fur hat was picked up floating on the river, and I understand underneath the leather lining was found the name of F. Adolphus Muir, Dinwiddie, Va. Whether he drowned himself or what become of him is unknown. I stayed there some time afterwards and he had not been heard of when I left. With respect,

JUNIUS P. ROLLINS.

Mr. John Muir,  
Darvilles,  
Din—

Postmarked  
"Way 5."

*W. N. Friend.* This word "Way" is in my hand-writing. Do not know when it was done; remember the morning "Way" was written on this letter, some one came to the office and asked if the mail had gone, after the bag was closed. He handed me a letter and said it was important that Mr. Muir should get it. Wrote the word "Way" and marked the figure "5" upon it, opened the bag and put it in. The letter was afterwards brought to me by Mr. Muir. As soon as I saw it I remembered the circumstances; do not remember who it was now. Mr. Epes came to my house on the twentieth and left on the twenty-fifth. Am postmaster at Petersburg, and proprietor of Powell's Hotel; Mr. Epes was not at my house in February.

*John Jarratt.* Mr. Epes' name is on my register fourth February, 1846. Did not see F. A. Muir there then. Am proprietor of Jarratt's Hotel, Petersburg.

*Marcus J. Gaines.* Saw prisoner in Petersburg on twenty-fifth and twenty-sixth February, 1846. Went with him from a "hop" the latter night to the house of a relative of his and a

friend of mine, where we stayed all night.

*Peter F. Cogbill.* Was well acquainted with Francis A. Muir; resided in Petersburg in February, 1846. He used to make the office of B. Boisseau & Co. his stopping place in whose employ I was at the time. His western letters (from Missouri) came to the care of B. B. & Co. by my request, so that they might be put in our box; don't know of his ever coming to Petersburg without calling at the office. Don't recollect to have seen him since February, 1846. I was at home on the fourth of February, '46.

*Mrs. Mary C. Harrison.* In 1846 lived at Capt. Epes. Mr. Muir came there quite early in the morning, after I was done breakfast; don't think he stayed long; he was on horseback, alone when he came; Capt. Epes rode away with him. Capt. Epes had a gun, but Mr. Muir none; have not seen Mr. Muir since; don't recollect when Capt. Epes came back; saw them as they passed around out of the gate; understood they were going deer hunting. Think it was early in February.

*Trent E. Harrison.* Was overseer at Mr. Epes. Was engaged

in burning the patches on the plantation in January and February. My rule was when working in the field to send one or two of the women to the house to suckle their children, and when they returned they brought the breakfast or dinner to those working in the field. Ross, a negro, was the carriage driver, and when not employed by his master, was under my orders, and worked in the field. While I was burning, he was absent about two days. Did not know what he was engaged about. About the end of February I put Ross to hauling wood, but discovered him lurking about the kitchen; was going to whip him for disobeying my orders, when he ran to his master. Captain Epes said I had a prejudice against the negro, and that I must whip him over his clothes for this offense. He afterwards told me he was going to make Ross a house servant, and keep him to wait on himself and family, and I must not consider him a field hand any longer.

*William H. Cousins.* Captain Epes came to my house about first May to obtain a release deed. He brought the deed and bonds, and handed them to Mr. John Muir, who seemed to be satisfied. There were three bonds.

*John W. Bailey.* The horse was found on my plantation on ninth February, 1846.

*Peter Boisseau.* Francis Muir rode my horse from my house some time about the close of January. Said he was going down to Stony Creek then to John's, and then to Captain Epes', to get the money for the bonds. Mr. Muir made my house his home when here, and

I told him he could get a horse whenever he wanted one; knew the horse as soon as I saw him. It is about twenty miles from my house to John Muir's, and I think it probable if the horse had been turned loose on the public road he would have come home. The bridle and saddle used by Mr. Muir when he rode away were mine, and the bridle exhibited by Mr. Allgood is mine.

*Wm. F. Thompson, M. D.* On the fifteenth of July, 1846, I went to the place pointed out to be the grave of F. Adolphus Muir, on the Grampian Hills—the plantation of Wm. D. Epes, about half a mile from Epes' residence. It was in a piney forest, on an eminence, at the foot of a large dead cherry tree, surrounded by a beautiful cluster of cedars; had to stoop very low to see the grave; directed the limbs of the cedar to be cut away, which bore no marks of having been previously touched; the grave was almost level with the surrounding earth; the surface was well covered with pine leaves, and unless closely examined, would have escaped suspicion; ordered the earth to be carefully removed out of the pit, which was about three and a half feet in depth. We found a human form; removed a handkerchief which was tightly fitted to the face; readily recognized F. Adolphus Muir, whom I had known from his infancy; there were the prominent teeth, the strongly marked features, the hair, and even the eyes not gone. Have no doubt of its identity with F. Adolphus Muir's; the neighbors watched the grave until the next day (the sixteenth),

when the Coroner's inquest was held; was on the jury; we had the handkerchief removed; his acquaintances recognized him, though the decomposition was rapid; discovered seven or eight large shot holes driven through the old bluish Petersham overcoat in which he was wrapped, and which I had often seen him wear; traced these through his black cloth dress coat, through the back of his vest, and the waistbands of his pantaloons to the left side of his body. From the scattering of the shot, I suppose he was some eight paces distant when fired on. There was a large round hole through his clothes into his chest, not far from the sternum, between the fifth and sixth ribs. There was not much hemorrhage externally. I made no dissection, being satisfied that either wound would have proved fatal; believe that he received the shot in the back first; if he had not there would have been no necessity for it, as the one in front would have caused death almost instantaneously. It was certainly the body of F. Adolphus Muir, and the injury, in my opinion, caused his death.

*B. B. Vaughan.* Was present when the body of Mr. Muir was found; was intimately acquainted with him; was with the party that went on the ninth of July to search for the body on the premises of Mr. Epes; wrote the note and handed it to Mr. Epes myself, stating that it contained our views. He at first hesitated, but at last gave his consent; am as confident as that I live, that the body found was the body of Mr. Muir; recognized the clothing worn by the deceased, and

likewise a button in his bosom with the letters "L. B." upon it. Saw a wound in the back, and another in the breast, which the doctors pronounced a second shot. A hair brush was found in the pocket; believe it to be the same I had seen him use.

*Marcus J. Gaines* (recalled). Was present at the search when the body was found; it was in a remarkable state of preservation, with the exception of the nose, which was decayed; was acquainted with Mr. Muir; am confident it was his body; deceased had a very peculiar head of hair; nearly red, and although it did not curl, it had a rigid waving appearance; would have identified the body anywhere; saw the marks of shot—some seven or eight—in the back; and in front a wound which was apparently made by an ounce bullet or musket ball.

*Peter Boisseau* (recalled). Was present when the grave was opened, and have no doubt that the body was that of Francis Adolphus Muir. He had frequently stayed at my house, and no doubt has ever entered my mind as to the identity of the body; he was one of the most amiable young men I ever saw; he stayed one-third of the time at my house, and I have never known a young man who was more generally beloved. To show his kind feelings for others, I was one day speaking to him of the prisoner, when I observed that I didn't like Epes. Adolphus remarked, "You don't know him, and have got a wrong opinion of him; I am intimate in his family; when I go to his house he treats me like a gentleman." I know the watch

very well and would swear to it; believe he bought it in Missouri; the last time he was at my house he had his watch; the next time I saw it was at Mr. Lumsden's store; have the watch here; the day of the search John Muir and I went up to where prisoner was standing; he asked me if I had said that Mr. Gholson had said that he could be made to pay the bonds over again? I answered, Yes. He then said, "You needn't trouble yourself about bringing a suit, as I will pay the money over again." John Muir stayed at my house the night of the second February, and went to Petersburg on Tuesday; got the watch in my possession on Tuesday after the search; got a warrant out then, and when we got to Mr. Epes' he had got off and was gone.

*Charles Lumsden.* On the twenty-first of May, 1846, I traded with Mr. Epes for this watch. On first September, 1843, I had repaired the same watch for Mr. F. A. Muir; when a person leaves a watch of any value to be repaired, and the repairs are of any importance, it is my custom to take down the name and number. By reference to my book I find that this is the identical watch I repaired for Mr. Muir—the name of the maker and the number are the same; persuaded Mr. Epes to have it repaired, as it was a valuable jewelled watch. It had evidently had a fall or jar of some kind, and the cost of repairing would have been about six dollars. Epes is the prisoner at the bar.

*Cross-examined.* When I traded for the watch did not recognize it. I identify a watch by

the name of the maker and the number, which are marked upon it. Every man who makes watches of any value puts his name and a number upon them. Would not recognize a watch by the name of maker without a number. Mr. Epes looked like a gentleman and I did not suspect him. The watch I gave Mr. Epes for his was as large but I do not think as thick as the one I got from him. Was bred to the watch-making business; my experience tells me that a maker never puts the same number on two watches. Wm. Harrison, the maker of this watch, is a very uncommon name; do not remember to have seen another watch with that name upon it; were I to make a watch complete, I would be familiar with it in all its parts; a great many watches are called "Tobias" watches, which I never saw; this watch was evidently a good one.

*William A. Muir.* Know the watch; was with my brother when he bought it of a school-master in Missouri, named Burns, who was at my uncle's house.

*William M. Gill.* On the day preceding the first search for the body I was requested to attend, and assist in making an examination on the premises of the prisoner on the next day; this was the first intimation I had ever had that suspicion attached to prisoner; went next day and joined one of the squads or parties engaged in the search; we passed near the prisoner, who was in a field where his hands were at work; he joined us, and commenced a conversation with me in relation to the reports in circulation; remarked to him

that I had said that morning, I would as soon suppose he would kill a man in anger openly, as any individual with whom I was acquainted; "but sir, that you are capable of committing such a dark, cold-blooded assassination as this, I cannot find it in my heart to believe." He replied that a man who was incapable of a mean act himself was slow to believe anything to the prejudice of his fellow man. I told him of the excitement and indignation that existed in the community; called his attention to the suspicious circumstances attending the disappearance of Muir, and besought him for the sake of his family, if he himself had no regard for public opinion, to relieve himself, if possible, from some of them; he admitted that appearances were against him, and declared his innocence, but failed to account satisfactorily; he said, why cannot the people as readily believe that the damned rascal has run off with money in order to defraud his brothers and sisters, as that a man of my property, and respectability of family and standing, would condescend to do such an act; I said it would be impossible to make any man who knew him, believe he was such a fool; that he had a perfect right to collect the money, bid his friends farewell, and go when and where he pleased, openly and publicly. He replied, well, he supposed the current of public opinion was against him and he could but submit. Said I, sir, if you paid Muir the amount which you say you did in Petersburg, you can certainly show where you obtained the money. He said he could, but did not

attempt to do it. I took occasion to mention it twice again; he replied in general terms he could.

*Dr. J. M. Hurt.* A few days after the first search, I being with Capt. Epes on the road, asked him to detail to me the particulars of the whole transaction. He said Muir came to his house on the morning he left his brother's, for the purpose of having a settlement with him; that they attempted to settle, but failed to do so; they then agreed to meet the second day following in Petersburg for the same purpose, a short time after which Mr. Muir left his house, saying he believed he would ride over in Brunswick a little, during which ride he was accidentally thrown from his horse and crippled in the right arm, his horse getting away from him, at the same time; a friend in a buggy passed along soon after and conveyed him to Petersburg, when he (Epes) met him according to agreement, and concluded the settlement by his paying off the bonds; Muir left Petersburg for New York, intending to engage in the mercantile business, which intention he declined, as he received a letter in New York from his family in Missouri, urging him to come immediately home, as their wants required the funds he had collected in Virginia; asked him if there had been no tidings of Muir since his departure from New York, to which he replied, by adverting to the Junius P. Rollins' letter, giving at the same time the contents of that letter. Mr. Benjamin Irby (who was present, and with other gentlemen had been listening to the conversation), remarked that in his opinion

"the writer of that letter was the murderer of Adolphus Muir," to which Epes replied by insinuating a suspicion, that he had embezzled the funds in his hands and absconded to Texas; said that in my estimation Mr. Muir was a gentleman of unexceptionable character, and I believed him to be thus regarded by the public at large, and asked him if he ever knew him guilty of any conduct that could taint him with the least dishonor? He replied that whilst the land he bought of the estate of Muir, was under the hammer of the auctioneer, and after it had been cried some time, and seemed likely to go off heavily, F. Adolphus Muir as an inducement to purchasers, publicly proclaimed a willingness to grant to the purchaser, if he desired it, an additional credit of one or two years on the purchase bonds. He became its purchaser, and in executing his bonds for the same claimed the additional indulgence Muir had voluntarily offered to concede, which Muir then refused, but on his representing to him the unfairness of such a refusal, and offering to prove to him by any number of respectable witnesses present, that he did make the tender of credit he claimed, Mr. Muir yielded the point, and the matter was then satisfactorily adjusted.

*Berthier Bott.* Went in pursuit of the prisoner the day the body was found; started with two or three others, and went as far as Farmville, when we returned. On Monday following again started from Dinwiddie court house; went to Lynchburg, where I ascertained that he had sold his horse; knew the horse

by marks upon him; had frequently seen him drove to Epes' carriage; pursued him to Texas, as far as Galveston, to which place he had traveled under the name of B. Davis.

*B. B. Vaughan* (recalled). Was at Mr. John Muir's the morning the body was discovered; something transpired which induced me to believe that Ross knew where the body was buried, and he was taken up. The duty of examining the negro was imposed on Messrs. Woodworth, Allgood and Gill.

*Peterson Allgood.* There was an understanding between us that Mr. Woodworth was to go in front with the negro; when he dismounted we were to ride up and dismount also. Mr. Woodworth dismounted near the cherry tree, where we all three commenced searching, and Mr. Gill and myself discovered the spot; the negro would not tell where the body was buried.

*Charles Lumsden* (recalled). Was called on once or twice by Mr. John Muir, to ascertain the name of the maker and the number of Adolphus Muir's watch; was called on by Mr. Peter Boisseau also; after he left, I endeavored to recollect, and after referring to my book, found the watch entered on the first September, 1843; left a memorandum to that effect at Boisseau & Cogbill's on Saturday night; called on Mr. Collier, stated that I had heard several rumors in relation to a watch; told him Mr. Boisseau had called at my house, and that I had given him the name and number; I then ruminated in my mind; I had made this trade with Mr. Epes, but had fixed some other name in my



mind, thinking it was a gentleman of Sussex county; mentioned the name of the young man I thought of, but was told I was mistaken; referred to my books, and found the name of "W. D. Epes." Consulted with a friend, who was strongly impressed with the belief that the prisoner should be arrested; Mr. Cogbill suggested that I should see Mr. Gholson; went to him and told my suspicions; I thought the evidence sufficient; Mr. Gholson thought not.

*Benj. J. Vaughan* (recalled). On twenty-third February, 1848, Wm. D. Epes, alias Judge Lucius V. Shelby, was arrested in Nashville, on the river Brazos, in Texas. After his arrest, we started in a buggy for Austin. Capt. Epes was not disposed to converse much, but on the second day, he commenced by stating he had seen in the newspapers that he had murdered his own son, his mother-in-law, and a hog drover, which charges he said he was not guilty of; but stated that this case was bad enough without charging him with others. He went on to say that Muir had come to his house for the purpose of collecting the bonds which he owed

him; that he had made arrangements to pay him, in consequence of his having been in bad health for some time; that he intended to have raised the amount by getting Claudius P. Bevil and Edwin G. Booth to become his endorsers on a negotiable note, and get the money out of bank; asked him if he did get the money out of the bank to pay those bonds? He told me he did not; asked him if he was with the party of gentlemen on the day the search was made for Muir? He told me he was; asked him how near any of the gentlemen were to the place where Muir was buried? He told me that at one time, some of them were not more than three or four feet; said to him that I thought it was very strange they had not discovered that the dirt was fresh dug. He replied that he was particular in having all the dirt put in the grave, and had covered with pine tags and brush, which made it resemble an old hog bed; asked him if the body of Muir had been found at that time, what would he have done? He said he did not know, but supposed he would have had to have given himself up.

### THE SPEECHES TO THE JURY.

MR. MAY, FOR THE COMMONWEALTH.

*Mr. May.* Gentlemen of the Jury: If nothing else had admonished me, my own feelings would admonish me, on this occasion, not to indulge in any harshness of expression or opprobrious epithets in relation to the prisoner at the bar. It was predicted by the prisoner's counsel that this prosecution would be conducted with harshness and severity. I here assure this jury that in the view which I shall present to you,

I shall attempt dispassionately to lay the case fairly before you; to state to you the facts proved in the cause and to urge you to make only fair and legitimate deductions from them, without myself indulging or expressing any angry or vindictive feelings towards the accused, or attempting to excite them in you. If the evidence which you have heard—if the detail of facts which have been so fully proved before you, do not arouse feelings of indignation in your breasts, then, gentlemen, no effort should be made by counsel to arouse them. I shall read to you the law. I shall bring in review the testimony, and I feel confident I can show that in accordance with that law and that testimony the prisoner has been guilty of an offense for which he should forfeit his life.

The prisoner is charged with having committed the crime of murder in the first degree. We are to maintain, on behalf of the commonwealth, that the prisoner is guilty of the “wilful, deliberate and premeditated killing” of F. Adolphus Muir.

The first important point which we must establish is that F. A. Muir has been murdered. I shall not consume much time in reviewing the testimony upon this point. From the cross-examination of witnesses called on to prove the identity of the body, it will probably be contended that such identity was not fully established. Dr. Thompson proves that the body was found on the fifteenth of July, 1846; that he had been intimately acquainted with the deceased, and is confident it was the body of F. A. Muir; that the body was in a remarkable state of preservation, so that there was no difficulty in any one who had known him while living deciding whether or no it was his body. On the next day an inquest was held on the body—a vast number of persons were present, and no question was raised as to the identity. John A. Muir, Peter Boisseau, Marcus J. Gaines, and Benj. B. Vaughan, one the brother, another the brother-in-law, and the others friends, who were well acquainted with the deceased, all swear to the identity. The peculiar growth or position of the front teeth, and the plug of gold in one of them, the hair, the shape and



size of his person, the clothing, the gold stud found in the shirt collar, which P. Boisseau so fully recognized, all prove the positive fact that the body found was the identical body of F. A. Muir. And then the circumstance must not be overlooked, that among the vast number of acquaintances, friends, kinsmen and neighbors who saw the body, no one has been brought forward to testify that any contrary opinion was entertained. I shall, therefore, without recapitulating the testimony, showing that the person whose body was thus found came to his death by gun-shot wounds, assume the fact as fully established that F. A. Muir was murdered by some one, and that this body found on the prisoner's farm, within half a mile of his house, on the fifteenth of July, 1846, was his.

The next point which we have to establish is, that the prisoner at the bar was the murderer. And let us inquire first what inducement there was for his commission of the murder? It appears from the testimony, that in the year 1841, the tract of land on which the prisoner resided, where the murder was committed, was sold by F. A. Muir, the executor of his father's estate, at public auction, and purchased by the prisoner on a credit of one, two and three years; bonds, and a deed of trust on the land to secure their payment being given; that the prisoner had not been able to pay the bonds as they fell due, and that in the latter part of 1845 the prisoner was pressed to pay them, and was informed that unless paid before Christmas of the year 1845, the land would be sold under the deed of trust; that the prisoner was unwell about that time, and was not called upon at Christmas, and that on the twenty-third of February, 1846, there remained due about \$3,000. Here, then, was the powerful inducement which prompted Epes to commit the foul deed. He owed a debt which he was unable to pay; he had expected to get the money from the bank on a note, which he hoped Bevil & Booth would endorse, as he confessed to B. J. Vaughan, but had not been able to do so; his forbearing creditor had gone over to obtain payment with the bonds in his pocket; the last day of grace had arrived, and

the next step was to be a sale of his house and home over the heads of his family.

Let us now, gentlemen, review the circumstances proved in the cause, tending to prove that the prisoner yielded to this strong temptation, and perpetrated the dark deed with which he stands charged. On Sunday evening, the deceased arrived at his brother John's residence, about four miles from the prisoner's, about six o'clock in the afternoon, and remained there that night. The next morning, February 23, he left his brother's on horseback, having Epes's bonds in his possession, alleging that he was going over to the prisoner's to receive payment of the amount due. It was furthermore agreed that the deceased was to return to John Muir's, where he was to stay that night; as John was unwilling that his wife should remain alone, he, John, having to go to Petersburg that day. It was furthermore understood that on Tuesday morning, John Muir's wife was to go over to her father's, William H. Cousins's, and the deceased was to meet John at Peter Boisseau's, about five or six miles from Petersburg, where both were to stay on Tuesday night. The deceased did go to the prisoner's; he himself has over and over admitted it, and Mrs. Harrison has proved it. Mr. Harrison also proves that after the deceased had stayed there not very long, she saw the deceased and the prisoner riding off together on horseback out of the front gate, the prisoner with a gun, the deceased without one. That they thus left the house about ten o'clock in the forenoon. That, gentlemen, was the last time the unfortunate young man was seen alive. Several witnesses have proved that diligent inquiries were made in the neighborhood, in Petersburg, amongst his acquaintances, and in every way that would probably have elicited information had he been seen; but all to no purpose. Nobody has ever been found who professed to have seen him after Mrs. Harrison proved he left the prisoner's house, but the prisoner himself, who said he saw him in Petersburg on the fourth of February. His body was found buried in a secret spot on the prisoner's plantation, not more than about a quarter of a mile from his house.

John Muir proves that he himself left home on the second of February, after the deceased had gone to Epes's, went on towards Petersburg, stayed at Peter Boisseau's that night, went on to Petersburg the next morning and returned to Peter Boisseau's on Tuesday night, expecting to meet the deceased there according to their previous arrangement. The next morning (Wednesday, the fourth) he left Boisseau's on his way and met Epes on the road, who told him he was on his way to Petersburg, where he had agreed to meet the deceased and settle with him. That he had called at John Muir's, expecting to find the deceased there, so that they might travel down together, but had found the house shut. The prisoner went on towards Petersburg and John Muir went on home. About eight days afterwards, the prisoner went over to J. Muir's and handed him a letter, purporting to be from the deceased, dated the fourth of February, which has been read to you. The letter was sealed. The prisoner went on to state to J. Muir, in substance, the contents of the letter, alleging that he had heard the statement from the deceased at Jarratt's Hotel. This letter is proven by the most incontestable evidence to be in the handwriting of the prisoner, and was delivered out of his own hand, sealed, to John Muir. It happens that it can be proved by Jarratt's books, as you have heard in evidence, that the prisoner was at Jarratt's Hotel, in Petersburg, on the fourth of February, but no proof that the deceased was there. The prisoner gave no intimation that he wrote the letter for the deceased. That it was not dictated by the deceased seems manifest. After the arrangement which had been made about the deceased staying with J. Muir's wife on Monday night, does it not strike you as most unnatural that in this pretended letter he could make no excuse for violating his promise? That he should not mention where he stayed on Monday night? If, gentlemen, he was not murdered on Monday, is it possible that after so much excitement and inquiry, there should be no one found who could tell where he was on Monday afternoon, and where he stayed on Monday night, and where he stayed on Tuesday night (the third)? You will observe also

the improbable statement in regard to the horse, contained in this letter. The horse was Peter Boisseau's, who had owned him many years. From your knowledge of the nature and habits of this animal, is it not most improbable that if he got away from the deceased, as pretended, he would have remained astray for a week without going to J. Muir's, where he had been staying, not more than a mile or two off, or to P. Boisseau's? He was found on Mr. Bailey's plantation a week after F. A. Muir's disappearance; a plantation adjoining Epes's, where he had been last seen by Mrs. Harrison when the prisoner and the deceased rode off together.

The next link in this strong chain of testimony, is the fact that the bonds belonging to the estate which John Muir proves the deceased had in his possession on the morning of the second, when he went over to the prisoner's, are next seen in the possession of Epes, the prisoner. This is a powerful circumstance. But what next? John Muir tells you that when Epes exhibited the bonds to himself and Wm. H. Cousins, the trustee, upon the occasion of his applying for a deed of release, one of the bonds had a receipt in full upon it, purporting to have been signed by Francis A. Muir. That at that time he had no suspicion of any foul play, and did not scrutinize the handwriting closely. He knew that they were the identical bonds which his brother had held, and seeing them in Epes's possession, and having received the letter just mentioned, and then believing all to be right, he consented to the release. He furthermore stated, that on the ninth of July, after his suspicions had been aroused, and after the neighbors had assembled to search for the body, and after Epes had been informed of those suspicions and called upon to explain, he again produced those bonds; that he, J. Muir, then noticed the signature of the deceased on the back of the bond, particularly, and stated openly in Epes's presence that the signature was not his brother's writing. That afterwards, on that same day, in the presence of Robt. C. Booth, the prisoner offered to J. Muir and P. Boisseau to pay the amount of the bonds "over again" without suit. Since that time these bonds have never been

produced. These circumstances show foul play. If that receipt be genuine, why is it not produced here before you? When all his neighbors and friends were around him, calling for some circumstance tending to relieve their minds from the suspicions forced upon them, when all suspected that F. A. Muir had been murdered on the second of February, what circumstance could have so well dissipated all suspicion as proof of his having executed with his own hand a receipt on the fourth? Had he not felt conscious that that receipt was a forgery, would he not have kept it as the apple of his eye? The prisoner's family connections are numerous, wealthy and respectable; if evidence could have been procured to prove the genuineness of that receipt, can this jury believe, for a moment, it would not have been done?

But, gentlemen, are these bonds the only property of the deceased found in the prisoner's possession? Where was his watch found? It has been proved by J. Muir, as you will remember, that the deceased had the watch on the Sunday evening before the fatal second of February. Is there a man upon that panel who doubts that the watch which the prisoner traded off to Mr. Lumsden on the twenty-first of May, 1847, was the same? Mr. Lumsden says, Epes brought the watch into his shop in Petersburg (he being a watchmaker) and offered to trade it off, alleging that he wished to get a lady's watch; that he examined it, found it had been jarred as from a fall, and advised Epes to have it repaired, telling him it was a very fine watch, and could be repaired for five or six dollars. Epes replied he would prefer trading it off, and finally traded for a gentleman's watch about the same size and thickness, giving Lumsden \$20 to boot, instead of getting a lady's watch; and it is quite likely, gentlemen, the watch he got was worth \$20 less than the one he gave. Now, where did he get this watch? Peter Boisseau, Jno. A. Muir and Wm. A. Muir prove that it was the watch of the deceased, so far as they could judge from general appearance from long acquaintance. But, providentially, Mr. Lumsden is enabled to identify it with certainty almost infallible. In 1843, Wm. A. Muir had carried

this watch, at the request of F. A. Muir, to Mr. Lumsden's to be repaired. Mr. Lumsden (as is the custom of watch-makers) entered on his books the number and maker's name, repaired it, and delivered it to F. A. Muir. In May, 1847, Epes traded this watch off with the same watchmaker. Inquiry being made about it, after Epes was suspected of being the murderer of Muir, upon reference to his books, Lumsden ascertains that the watch he repaired for F. A. Muir in 1843 was the same watch he received of Epes in May, 1846. Wm. A. Muir proves that F. A. Muir had kept the same watch from 1843 till his disappearance. Around the neck of the deceased, when found, it is proved there was part of a watch guard which appeared to have been cut with a sharp knife. How did the prisoner come to the possession of this watch? It was certainly the property of the deceased, and was in his possession when he went to the prisoner's on the morning of the fatal second of February. Can you resist the conclusion that Epes first murdered the deceased, then rifled his pockets of the bonds, and then taking his watch, without waiting to take the guard from around his neck, hurriedly cut it with his knife, and pocketed it himself? I anticipate that the prisoner's counsel will contend that we have not identified the watch as Muir's. You will be told that it is a possible thing, yes, that our own witness, Lumsden, admits that it is a possible thing for the same maker to put the same number on two different watches; indeed, that he has seen watches with the same number and the same maker's name. But, gentlemen, remember Mr. Lumsden said that it was only on very common, indifferent watches that this occurs—watches on which the real maker's name is not placed; but some other name than his; that he has never known this to be the case in fine watches, such as this was. That when a maker makes a good watch he puts his own name on it, that he may establish his credit; and that in all his experience he has never known two fine watches made by the same maker with the same number on them. Watch-makers, gentlemen, number their watches as regularly as bank notes are numbered. They commence with number 1,

and go on progressively and regularly. But I will not detain you longer in reviewing the testimony which so fully establishes the identity of the watch.

We have thus, gentlemen, produced on the part of the commonwealth, what seems to me conclusive evidence, first, of the identity of the body of the deceased; second, that the letter of the fourth of February was in Epes's handwriting; third that the receipt on the back of the bond was a forged receipt, and fourth, that the watch of the deceased was soon after the murder in the prisoner's possession. Now I call for the proof to rebut these facts. Where, among all that vast concourse of people who saw the dead body, is the man who will say he did not believe it to be that of F. Adolphus Muir? Where is the witness who will swear he believes the handwriting of that letter not to be Epes's? Where is the witness to prove that the receipt on the bond is genuine? Where is the bond itself? Who is brought to prove to you that Epes was the owner of that watch? Where did he get it? How long had he carried it? The prisoner furnishes you no proofs to excite a doubt as to the truth of the evidence thus produced against him.

There is another circumstance to which I will now call your attention, connected with this watch which seems very important. The prisoner had met the assembly of his neighbors, had heard, face to face, a statement of their suspicions; had witnessed, with undaunted boldness, the search made for the dead body, even when within a few paces of the grave; had firmly withstood the earnest appeals of Wm. M. Gill in regard to the source from whence he had obtained the money to pay off the bonds he pretended to have taken in—all this he had withstood, unintimidated—he saw that without proof no harm was to be done him, and yet, so soon as it was rumored about Petersburg that the watch had been found, and sufficient time had elapsed for the intelligence to be communicated to him, we find him suddenly and rapidly absconding, and fleeing beyond the confines of the United States.

But, gentlemen, those bonds and the watch were not the



only property of the deceased which we can trace to the prisoner's possession. You have heard a letter read purporting to be a letter written at New York by the deceased, dated February 14, 1846, addressed to Jno. A. Muir, Darvill's. This letter is proved by V. J. Vaughan, Perry L. Derby, and C. P. Bevil, to be in the handwriting of William Dandridge Epes. Several other witnesses have proved that it is not in the handwriting of F. Adolphus Muir. And here again we look in vain for any rebutting testimony. No one among the numerous acquaintances of these two individuals, both men of business and men of good education, who will say that he believes that letter not to be in Epes's handwriting, and no one who will say he believes it to be F. Adolphus Muir's. Can there then be a rational doubt as to the fact that the prisoner wrote that letter? What did that letter contain? Two bonds which Jno. A. Muir proves were in the possession of the deceased the morning of February 2, when he left his house. It was certainly a most ingenious contrivance to lull suspicion and confirm the impression on the mind of Jno. A. Muir that his brother had in fact gone to New York. But so soon as suspicion was excited, and the letter and circumstances canvassed, we find manifest evidence to confirm the belief that Epes wrote this letter. It purports to have been written, as before stated, at New York, on the twelfth of February, and was, as appears by the postmark, mailed at Petersburg, February 26. Where was Epes on the twenty-sixth? Marcus J. Gaines tells you he was in Petersburg. That he slept in the same room with him the night of the twenty-fifth in Petersburg. Upon reading that letter you see that the deceased is represented as being so penurious as to send this letter by a stranger in order to save five cents. But again you will find in the letter the following remarks: "You find this letter mailed from Petersburg. I met with a gentleman on his way to that place, by whom I sent it with a request to have it mailed in Petersburg to Old Darvill's." Was there ever a more bungling blunder? "You find this letter, etc." "I met with, etc.," "by whom I sent it, etc." The writer of that letter had in his possession



two bonds which were enclosed in it, and which the deceased had in his possession when he left J. A. Muir's, on the morning of the second of February. Who was the writer of that letter? Is not the evidence conclusive to show that it was the prisoner at the bar?

But, gentlemen, there is a third letter. It purports to have been written by a man named Junius P. Rollins. Where was Epes on the twenty-third of May? Mr. Friend tells you he arrived at his hotel in Petersburg the twentieth of May and remained till the twenty-fifth. Mr. Lumsden tells you he was in his store in Petersburg on the twenty-third, and traded off the watch, as before stated. Who wrote this letter? The same witnesses, Vaughan, Derby, and Bevil, prove it to be Epes's. Mr. Derby, a very intelligent gentleman, well known to you all, I believe, to be a just, calm, conscientious man, tells you that although there is manifestly a great effort to disguise the hand (which you yourselves, gentlemen, upon inspection will perceive, especially in the capitals at the commencement of the letters), yet there is scarcely a line in the letter where his handwriting is not manifest. That this whole letter is a tissue of falsehood you cannot doubt. Let us read it. (Here *Mr. May* read from the letter.) Now, gentlemen, what is the impression intended to be produced by this letter? Why, that F. Adolphus Muir had collected this money, which, as executor, he had a right to collect, and in which his brothers and sisters had an equal interest with himself, had gone off with it to New York, had absconded, under pretence of going to Missouri, had then thrown his hat into the river so as to induce his family to believe he had been accidentally drowned, and had gone off under a fictitious name, with the money, intending to appropriate it all to his own use and defraud his brothers and sisters out of their just proportions. Who wrote this letter? The prisoner at the bar. Gentlemen, was it not enough to have deprived this amiable, unsuspecting young man—his friend—of his life, to have murdered him in cold blood, and to have rifled his pockets? But must deeper injury be inflicted on him? Must he be robbed of his charac-

ter also? Was it not enough to have inflicted upon his affectionate relatives the loss of one so dear to them all? But must they suffer the severer pain of having it instilled into their minds that their brother, in whom they had confided, had proved to be a dishonest man? Had defrauded his family, and either absconded with the money or destroyed himself by committing suicide? I said in the commencement of my remarks that I desired to apply no harsh epithet to the prisoner; but what epithet could indicate so deep a state of depravity, as the bare recital of the conduct of the prisoner, as proved in this cause?

But there is other evidence tending to prove who was the writer of this letter. There are other corroborating facts proved, showing that other efforts were made to insinuate into the public mind a belief of the suspicion attempted to be inculcated by this Junius P. Rollins. (Pointing to the prisoner.) What did the prisoner say to produce that impression? He asked Mr. Gill, "if it was not as reasonable to suppose that the damned rascal had run off with the money with the intention of cheating his brothers and sisters as that he should have murdered him?" He, forsooth, is so great a gentleman, that he is above suspicion! What! could he be suspected of committing so base an act? He who was so high and lofty that he would not condescend to speak to his poor neighbors, nor to a member of a patrol in the discharge of his duty who went to his house?

*Mr. Joynes.* What evidence was there to that effect. I appeal to the Court.

*Mr. May.* I beg pardon for having referred to that circumstance which, I admit, was not in proof before the jury. I am glad the counsel interrupted me. Both he and the Court, I am sure, are aware how I was led to refer to that fact as if it had been in proof before the jury.\* I regret that I was not

\*The circumstance here referred to by Mr. May, was stated by a freeholder, summoned as a juror, who was sworn on his *voire dire* and made the statement before the panel was completed, and the jury impanelled.

sooner interrupted; for, if I know myself, I would not state a single fact to the prejudice of the prisoner, which I am not warranted in doing by the legal evidence in the cause.

The impression, gentlemen, which Epes attempted to make on the mind of the public was identically that which this letter of Junius P. Rollins was intended to inculcate. You recollect the same idea was presented in the conversation he had with Dr. Jethro Hurt, before he knew he was suspected. He sought to make Dr. Hurt believe that Mr. Muir had gone off with the intention of defrauding his family—that he had proved to be a villain!

There are other circumstances showing that the same individual who wrote the New York letter wrote the Junius P. Rollins letter. If you will observe the word "New York," which occurs in both letters, you will see that they are perfect fac similes of each other. You will also observe that the word "Missouri," which also occurs in both letters is mis-spelt "Misouri." I do not observe another mis-spelt word in either letter. Is it not remarkable then, that Mr. Muir, who had resided in Missouri, should not have known how to spell the word correctly, and that J. P. Rollins, who had spelt every other word in a long letter correctly, should have made the same blunder? You can readily account for it when you learn that the same hand (that of the prisoner at the bar) penned both. You see that all the testimony tends the same way. The main stream of itself would bear you on to the same conclusion; but all the minor currents falling in with it still increase the tide and make it more irresistible. I know it is important you should be satisfied beyond a reasonable doubt that the prisoner wrote both these letters. Perhaps the similarity of the handwriting of the word "New York," the mistake in the spelling of the word "Missouri," the concurrence of sentiments as expressed in one of those letters with those expressed by the prisoner to Mr. Gill, Dr. Hurt and others, would not be alone sufficient; but when these are brought in to corroborate the positive evidence of B. J. Vaughan, Perry L. Derby, and C. P. Bevil, that they are the prisoner's handwriting; the

negative evidence of P. Boisseau, Dr. Thompson and John Muir, that the New York letter is not in the handwriting of F. A. Muir; and further, when you take into consideration that among all the numerous acquaintances, and the intelligent, wealthy and respectable family connections of the prisoner, not one has been produced to testify either that he believes the letters to be Muir's, or that they are not the prisoner's handwriting, can you, gentlemen, harbor a rational doubt as to their authorship? Are you not forced to the conclusion that the prisoner wrote all three of those letters?

Another circumstance to prove the prisoner's guilt is his flight, his escape. You will be told, no doubt, that flight is no proof of guilt. It is admitted, that if there were no other evidence against the prisoner than the fact of his flight, you might entertain doubts. We can well imagine the case of a man, without friends or connections, charged with a heinous crime, who, though innocent, might flee; there have been such cases reported, and probably some may be read to you by the prisoner's counsel; but this is not such a case. The prisoner had had abundant proof that no violence would be done him. He had numerous relatives and friends; he had witnessed the cautious prudence of those who suspected him; how unwilling they were to make the charge; how solicitous that he should clear himself if innocent; even after the watch had been found, what an unwillingness there was to arrest him unless further proof could be obtained; and why? Because of his previous character, of his respectable family connections. No one was willing to believe him guilty of so base an act without the strongest testimony. Had he been a timid man, had he been a stranger in a foreign land, his flight would not have been so strong a circumstance of guilt. But he was not a timid man; he had faced with calm courage a host of his neighbors, who could have demolished him in an instant had they been disposed to act without proof. He was not a stranger, but was with his family and friends. What then but conscious guilt could have induced him to fly from his home, his country, his family and his friends, to seek, under a false name, an

asylum beyond the limits of the United States? I appeal to you, gentlemen, whether, in this case, the prisoner's flight is not a powerful circumstance against him?

But there are minor circumstances, all tending to swell and strengthen this strong current of proof of guilt. How was the grave discovered? You have been told by Mr. Allgood, that it was through a slave named Ross, then the property of the prisoner. The prisoner had made his escape on the eleventh of July, and on the fifteenth of July, Ross shows the grave. Now, remember, Mr. Harrison, the overseer, proves that on the last day of January he had finished burning one plant bed and the next Monday, which was February 2, had commenced getting up another. He remembers that in the early part of that week (what day he does not state positively), when he left the plant bed, where Ross was engaged cutting wood, to go to his dinner, he left Ross at work. He returned to the plant bed after dinner, and Ross had left his work. He did not see Ross, that is, Ross did not return to work till the second day after. Now, gentlemen, if it be surmised that Ross might have committed the murder, I think you will see that it could not be. Mrs. Harrison proves that Mr. Muir left Epes's in the early part of the second day of February. Mr. Harrison proves that Ross was at work on that very day till the afternoon. I admit Mr. Harrison does not prove that Ross did leave his work on Monday. It might have been Tuesday or Wednesday; but it certainly was not till the afternoon of either Monday or Tuesday, or some other day of the first week in February; and as Mr. Muir left there in the early part of Monday, Ross could not have seen him. Besides, there was a want of inducement on the part of Ross to commit such an act, as well as the improbability that he could have procured a gun. The irresistible conclusion to which this testimony must bring your minds, seems to me to be, that the prisoner murdered Muir in the morning, and had the services of Ross in the afternoon of the second, and the whole of the third of February, in burying and concealing the body; and that on the fourth, after Epes left home for Petersburg, Ross returned to

his work under the overseer. This view is strengthened by the circumstances related by Mr. Harrison of the subsequent disobedience of Ross, and of interference of the prisoner in his behalf; and, especially, his informing the overseer that he was no longer to consider Ross as under his control.

The circumstance that the deceased was shot with buckshot, and that Mr. Bailey had, a few days before, sent the prisoner some buckshot, and the further circumstance, that the horse of the deceased was found at Mr. Bailey's, adjoining the prisoner's, are not to be overlooked. Alone, they would have but little weight, but in this case every circumstance, whether strong or weak, tends to point to the prisoner as the perpetrator of this bloody deed; and taken together, they form a chain which cannot be broken.

But last of all, gentlemen, comes the voluntary, unsolicited confession of the prisoner. On the twenty-fourth of February, 1848, the prisoner was arrested for the murder of F. A. Muir, by B. J. Vaughan, in the town of Nashville, in the State of Texas, by authority from the Governors of Virginia and of Texas. Mr. Vaughan travelled with him in custody on his way back to Virginia that day, and set out the next morning again on his journey; after proceeding some miles on that second day, the prisoner, himself introducing the subject, remarked that he had seen a statement in the papers that he had murdered a hog-drover, his own son, and his mother-in-law; that he was not guilty of those charges, "this case is bad enough." He then, in reply to inquiries by Mr. Vaughan, described how he buried and concealed the body of Muir, stated that he was with the company who searched for the grave, and that some of the company came in a few feet of it; also that he had not paid the bonds, having been disappointed in getting money, etc. Compare this acknowledgment in regard to the non-payment of the money, with what poor F. A. Muir was made to say in the letter of February 4, which was handed to John Muir by the prisoner, and say, can all these facts be consistent with the innocence of the prisoner? Do they not prove beyond all rational doubt, almost beyond the

possibility of error, that the prisoner is guilty of this grave charge?

I have thus, gentlemen, reviewed the whole testimony in this cause. I have endeavored to do so calmly and justly; and while I have nothing extenuated, I have endeavored to set down nought in malice. To say that I do not feel indignant towards the perpetrator of an act, such as I think the evidence so clearly proves the prisoner at the bar to have perpetrated, would be to acknowledge myself devoid of all honorable sensibility. At the same time, I hope and believe I have not suffered my feelings to bias my judgment as to the weight of the evidence, nor to betray me into any misstatement of the proofs. I have attempted to state the evidence fairly, and to deduce from it none but fair and just inferences. Is there any man of proper feelings, any man who has a heart to feel, who would not desire to see the perpetrator of such an act as I think the evidence in this case proves the prisoner to be guilty of, punished according to law? Who would be willing to see him go unpunished? Ought not the attorney prosecuting on behalf of the commonwealth to exert every lawful effort to bring the offender to punishment? Ought the jury to hesitate, whatever may be the consequence, to do their duty like men, and bring in a verdict according to the fair legitimate effect of the law and testimony? Ought the Judge to hesitate, should you find the prisoner guilty, however severe the penalty imposed by law, to pronounce the sentence which the law imposes? If he be found guilty and condemned, the fault will not be mine, nor yours, nor that of the Judge; but of his own evil heart; neither the attorney who prosecutes him, nor the witnesses who testify against him, nor the jury who finds him guilty, nor the Judge who passes sentence on him, nor the executioner who may execute him, should he be condemned to death, should feel one pang of regret that the guilty perpetrator of such a deed shall have been brought to justice, or that they should have been the instruments of bringing about the result. All should feel regret that any one should be found base enough to commit such a crime; but all should be will-



ing to meet cheerfully the responsibility of vindicating the outraged majesty of the law. Take the case, gentlemen, and decide it under the solemn sanction of the oath which you have taken, according to the law and the evidence which you have heard.

MR. RIVES FOR THE PRISONER.

*Mr. Rives.* Gentlemen of the Jury: I rise to open the defense for the prisoner at the bar, under a state of embarrassment far more weighty than any which I have ever heretofore experienced. The great responsibility which rests upon us all, must now be met, and I am free to confess, when viewed in connection with what has passed before us, I doubt whether we can divest ourselves of all the extraneous influences which have operated upon our passions, and aroused our sympathies, during the examination of the witnesses—whether we can stem the torrent of public indignation on the one hand, and sever the cord of sympathy on the other, which has been woven by the eloquent tears of the relatives of the deceased.

This heart-rending spectacle was witnessed by you—this feeling is known to exist to a certain extent by all; and I pray you to search well your own hearts, test yourselves, and recollect those wise words of Solomon, “Man, know thyself.” Yes, gentlemen, know yourselves—know that the thousand outdoor rumors, all running against the prisoner at the bar, cannot, and shall not, have any influence over your minds. Know that the deep-rooted prejudice which is known to exist in the bosoms of those who are now present, and I may add, of the entire community, shall not intimidate you in the discharge of your duties; whatever impression may have been made on your minds by the many rumors which have spread far and wide over the land, I ask you now to forget. Yes, gentlemen, forget all, but your oaths, the testimony, the commonwealth, and the accused. This I know you can, and will do. But can you, in the face of what has transpired before you, resist the rush upon your sympathies, caused by the eloquent tears which softened the accents and melted the hearts of the two



intelligent brothers, who were testifying as to facts which they believed established the death of a favorite brother, and that the prisoner at the bar was his murderer? It was a rich, a lovely scene. What nobler impulse of the heart, what purer stream of nature, than the briny tear tracing the redolent cheeks of a heart-stricken brother? What heart did not sympathize, when the swimming eye and palsied tongue told that grief had the mastery? Who, I ask, did not wish to weep with them? Sirs, I loved the manly tear; I felt that in it I saw the inner man was right. I looked back at my own days of sorrow, and recollected that I, too, had had to weep over a dead brother; I looked on you all, and thought that you, too, might have had the same sad duty to perform, the same feelings of grief to give vent to, over the death of a son, a wife, or a brother.

Then it was I thought I saw an impression made upon your feelings, which I feared, and still fear, it will be difficult if not impossible for you to eradicate, and approach this trial uninfluenced by its operations. But justice, truth, and the oath you have taken, all tell you that it must be done.

Then, know yourselves, know that your minds are in such a state, that you can stand indifferent between the commonwealth and the accused.

Recollect, that before you sits the prisoner, down-trodden, humiliated—one against whom every hand seems to be turned. Recollect, that he has no friend upon earth to do him justice, save yourselves, the jury of his country. Recollect, that you are sitting upon the trial of a fellow-being—that you are sitting upon the trial of one made in your own image—aye, in the image of God himself. Recollect, that the Great Ruler of the universe who sees and knows the deeds of all, has spared his life from the origin of this charge, to the present day—that you are now treading on holy ground—upon the confines of divine power. Recollect, that the glory and beauty of our institutions guard him against such a sham trial as was awarded to Christ, the Savior of man. There the cry of “Crucify him, crucify him,” rung in the ears of the Judge. Here,

however depraved and abandoned he may be, he is entitled to an impartial trial by a jury of his peers; and I thank God that there is no man so reckless and so lost to honor, who will, in the momentous struggle against all odds for the life of a fellow-creature, cast the sword of Brennus into the scales of the commonwealth.

I will now, gentlemen, attempt to meet some of the arguments advanced by the prosecutor for the commonwealth (*Mr. May*), who has opened the prosecution in a spirit of candor and fairness which is so characteristic of that gentleman. And permit me here to say, in advance, in the presence of his Honor, and in the hearing of all here assembled, that it is not my intention to reflect upon the credibility or to attempt to impeach the veracity of a single witness who has been examined. On the contrary, I will say for them, that for integrity, intellect, and respectability, I have never seen them surpassed in the trial of any cause, either civil or criminal.

But you must recollect that what they testify to are circumstances and facts founded on their belief, from which you are to draw conclusions. Not one of them has told you that he saw William Dandridge Epes strike Francis A. Muir a blow, or give him a harsh word. If such an assertion had been sworn to by any one of them, I should have turned my back upon the prisoner, and left him to you to have inflicted upon him that punishment which he would have so richly deserved.

It is your province to look at all the circumstances, weigh well the facts, and when you shall have done so, if there is not a rational doubt on your minds as to the guilt of the prisoner, then you must find him guilty. If, on the other hand, you have any such doubts, upon any fact or circumstance necessary to his conviction, then he is entitled to that doubt, and you must find him not guilty.

Like yourselves, before I heard the evidence, I was induced to believe from the rumors afloat, that the proof at the trial would be so full, clear and convincing, that the work of conviction would be complete. Instead of that, we find a long train of circumstances from which you are to make up your

verdict, which will require more than ordinary effort of the mind to give to each its proper place, and that weight to which it is entitled.

It was the close and studied effort of the counsel for the commonwealth to bring to your notice every circumstance which he thought would operate against the prisoner; and with like tact and ability, he failed to mention one single fact that might be considered in mitigation or explanation of the conduct of the accused.

In reviewing the positions which that gentleman assumed to be true, I shall, unlike him, after stating the facts, leave you to come to such conclusions as you may think proper, right, and just. I shall not tell you any fact is so or not so, because I hear witnesses say they believe, from circumstances, such facts do exist. It is for you, after you shall have heard the testimony of witnesses, to say whether their opportunities of seeing, discriminating, and judging, were such that they might not reasonably err in what they supposed to exist.

The whole of the evidence being presumptive or circumstantial, I ask you as an act of justice to the prisoner, as a duty you owe yourselves, to weigh well the bearing of each and every circumstance which has been laid before you. You were told there was no doubt of the guilt of the prisoner; that the commonwealth had a case so clear, that he who runs might read. Why, gentlemen, cast your eyes around, and let the commonwealth tell you why it is that she has brought to her aid the forensic eloquence and legal abilities of my worthy friend, Mr. Thomas S. Gholson, who now occupies a stand at the head of his profession in his own town, and I may almost say in the circuit? Why, I ask, were his services engaged, if it were not by argument and ingenuity, to remove some doubts which it feared might defeat the effort to obtain a verdict of guilty? There can be but one opinion about the commonwealth being here doubly present to-day. Think you, gentlemen, if the commonwealth's prosecutor had to carry this book (*holding up a book*) across the room, anybody would ever think of employing an assistant to act with him? Your good sense

will at once answer, no. But if he had to carry a weight which he could not himself well manage, then there would be necessity of aid for fear of a failure. So it is here; not that there is any fear that the legal and rightful prosecutor cannot fully and ably represent the interest of the commonwealth—none who know him doubt his ability to do this. But there is fear that he cannot draw the picture dark enough—hence, you find the talents of my friend enlisted, whose eloquent tongue is more powerful than the pencil of the painter in coloring his canvas.

But I warn you, gentlemen, to act for yourselves—yours will be the troubled conscience, if in an unguarded hour you should bring in a hasty verdict that might cause future regrets.

You were told by the prosecutor that the prisoner stood charged with the murder of F. A. Muir: and that it was necessary to prove that the dead body found on the plantation of the accused was the body of F. A. Muir. To do this, he referred you to the testimony of Messrs. John A. Muir, B. B. Vaughan, M. J. Gaines, Dr. Thompson, and others, who all spoke with great certainty as to the identity of the body, the preservation of the features, except the nose; all of whom seemed to be satisfied that they could not be mistaken. The characters of these gentlemen stand so deservedly high, that it will not be necessary for me to apologize for attempting to show from scientific medical authorities, that if the murder of F. A. Muir took place at the time when he was last seen with the prisoner, to-wit, on the second day of February, 1846, that it would have been impossible, if the authors to which I refer are correct, for any, or all of them, to speak with that certainty of the identity of the dead body, as to leave no doubt about the probability of their being deceived. You will remember, gentlemen, that each and all of them stated that there were no peculiar physical marks on the body, or private mark on the clothes, by which they could identify it. Only from its general appearance after death, when compared with the resemblance, in the mind's eye, in

life, did they pretend to speak of its identity. And here, gentlemen, let me appeal to you as men of experience and observation, to reflect on the sudden changes from life to death. What do you often hear as the first expression of those who are looking on the corpse of some deceased friend, "Oh, I never saw anything like it, he looks as natural as life." Whilst of others you hear it frequently said, "Bless me, I never saw such a change, he does not favor himself at all."

I venture there is not a member on that panel, who has not heard such declarations within forty-eight hours after the death of some friend or acquaintance. Yet you are called upon, in the face of your own observations and every day's experience, to give up settled facts, which have come within your own knowledge, and place implicit confidence in the opinions or belief of others, who, like all of us, are liable to err.

The witnesses formed their opinions from what they saw before them, and you are to decide whether under the circumstances, the condition of the body, the length of time it had been interred, whether it was such that they could not only tell that it was the body of F. A. Muir, but that he was murdered by the prisoner on the second of February, 1846.

Bear in mind, that the body was disinterred on the fifteenth of July, 1846—and consequently, if it was the body of F. A. Muir, and that he was murdered on the second of February, 1846, it must have lain in the ground in a shallow grave (for such is the proof), for five months and thirteen days, without a coffin, and nothing to protect the face save a thin handkerchief thrown over it.

You are aware, gentlemen, that Dr. Thompson, an intelligent physician, introduced by the commonwealth, was examined as to the degree of temperature and condition of the body after death, most favorable to putrefaction and decomposition—how long before putrefaction commences, and on what parts of the body it first takes place. To which questions the doctor gave answers as accurate as is usual for one who has not had much experience in post-mortem examinations of bodies, with a view of ascertaining their identity. His present recollection

not coming up to his early reading, and differing in some important particulars from standard writers on Medical Jurisprudence, permit me, in order to remove every doubt, to read from such works as are recognized to be eminent in this branch of their profession, that the above position may be clearly defined.

First.—Temperature necessary to putrefaction.—(Guy's Med. Jurisp., page 385.)—"Putrefaction is arrested by a temperature of 212° and of 32°; in the former case the body is reduced to dryness by the evaporations of the fluids; in the latter the fluids are congealed. The most favorable temperature is from 70° to 100°. Putrefaction, therefore, takes place more rapidly in summer than in winter, and, other things being equal, varies with the temperature."

Mode of interment.—(Guy's Med. Jurisp., page 388.)—"In dry, elevated situations, putrefaction goes on slowly: in low, swampy grounds, rapidly. A dry, absorbent soil retards, a moist one accelerates, putrefaction. The nature of the soil exercises an important influence. In sand or gravel the change goes on slowly and adipocere is rarely met with. The deeper the grave, *ceteris paribus*, the slower the putrefaction. The more completely the body is defended from the air by clothes or coffin, the more slowly does putrefaction go on. It is rapid where the body is exposed to the soil, but very slow when buried in a coffin hermetically sealed."

Where does putrefaction commence?—(Guy's Med. Jurisp., page 385.)—"The body naturally contains, in all its parts, moisture enough to insure its decomposition; but those parts which contain the largest quantity of fluid are most prone to putrefaction, e. g. the brain and eye. Dropsical subjects, again, putrefy more speedily than those which are free from accumulations of fluid."

How long before the features are destroyed?—(2 Beck's Med. Jurisp., page 40.)—Orfila says: "In all his examinations of disinterred bodies, every portion of the face was destroyed between the third and fourth month, although the bones remained slightly attached by their articulations."

Let us now apply the tests here laid down to the body sworn to by the witnesses. You find that the body was interred in a shallow grave, without a coffin, and nothing over the face except a handkerchief, for one-third of the winter, the entire wet season of the spring, and exposed to the sultry heat of half the summer. Combining in the course of that period, not one, but all the elements necessary to putrefaction—to-wit: shallow grave, exposure of the body to the earth, the face particularly, moisture, and a temperature ranging as high as sum-

mer heat. Further, that part of the body, the eye and brain, under any circumstances most likely to putrefy first, being actually in a situation more exposed than any other.

Did it lie in the ground long enough to undergo putrefaction? The writers say from three to four months. Here the proof is, it lay in the ground five months and thirteen days.

Gentlemen, is the experience of such men as Beck, Guy, and Orfila to be thrown away as not worth the paper on which their opinions and reports are written? I cannot and will not believe it. Writers who had obtained such eminence in their profession, will be regarded by you as laborers in the vineyard of science, and you will give their opinions that weight which they justly merit.

The effort to identify dead bodies which had physical marks upon them, has led to such glaring and flagrant errors, that I beg leave to read you the celebrated case of Timothy Monroe, and its identification with that of the murdered Free Mason, William Morgan.

(Guy's Medical Jurisprudence, pp. 31 and 32.)—"The reader will, in this connection, call to mind the celebrated case of the discovery of the body of Timothy Monroe, on the beach of Lake Ontario, in 1827, and its identification with that of the murdered Free Mason,—William Morgan. The body, when found, was much bloated, and in an advanced state of decomposition, and the coroner's jury gave in a verdict, that it was the body of some person unknown to the jury, who had perished by drowning. The body was therefore interred. A rumor, however, soon got into circulation, that this was the body of William Morgan, who had disappeared thirteen months previously, in a mysterious manner (and of course, must have resisted the action of a summer's heat and a winter's cold, and still retained the form and semblance of the human form). The body was disinterred; another jury summoned, and a second inquest was held on the fifteenth of October, 1827, eight days after the first, at which Mrs. Morgan was summoned, together with the family physician, John D. Henry, M. D., of Rochester, and several others who were intimately acquainted with Morgan during his lifetime. Mrs. Morgan testified that she had not a particle of doubt of the identity of the body, that she fully believed it to be that of her husband. It was bald, had a grey beard, with long white hairs in the ears, and much hair upon the breast; the left arm had the marks of inoculation upon it; the teeth were double all round; and in all these respects the resemblances were said to be exact. Two of Morgan's teeth had been



extracted; the dentist who extracted them was now present, having the teeth with him,—the body had also had two teeth extracted on the same side of the face, and the teeth held by the dentist fitted them as exactly as if they had been drawn from thence; while the hair, hands, feet, nails, fingers and toes, were, in Mrs. Morgan's opinion, exactly like those of her husband. A surgical operation had been performed upon the large toe of the left foot, which gave it a peculiar conformation, and precisely so was it with the body under examination. In short, it appeared, most conclusively, and beyond a doubt, from the testimony of many witnesses, physicians and others, that the body was that of William Morgan, and none other. The dress, however, bore no resemblance whatever to that worn by Morgan when he disappeared, or that he had ever worn. The pockets also were filled with tracts, published by the British Tract Society, a kind of publication which Mr. Morgan had never been known to be partial to, or to patronize particularly,—still the verdict of the coroner's inquest was, that the body was that of William Morgan! The body was therefore removed to Batavia, and buried with great pomp and ceremony, as that of a martyr. Soon after, an advertisement appeared in a Canada paper, offering a reward for the discovery of the body of Timothy Monroe, who was drowned at Newark, in the Niagara river, five or six weeks previous to the discovery of the body. From a minute description of the clothes, cravat, tracts, body, etc., it was perceived at once that they corresponded with those of the body which had been declared to be that of William Morgan. The body was once more disinterred; another inquest held; and now it was discovered, for the first time, that the body did not so closely resemble that of Morgan, as had been stated. The teeth, for example, were not double all around in front, as were those of Morgan, and five had been extracted from this body, whereas Morgan had lost but two. This jury, therefore, which sat on the twenty-ninth of October, fourteen days after the last, declared the body to be that of Timothy Monroe, of Upper Canada."

Here you find three inquests, thirty-six men, all after due deliberation and strict examination, called under oath to view the same body, each inquest reporting the body to be that of a different person. And I ask you whether you ever saw or heard of a case in which a more minute and accurate description of a body was given, either of the dead or the living, than was given by the witnesses who testified to the bodies of Monroe and Morgan.

It will not be pretended that the witnesses who testified to the body of F. A. Muir made any effort to ascertain whether they might not have been mistaken. One would suppose, when



looking at the particularity and caution used in Monroe and Morgan cases, and that used in the case before us, that here, there was not such an examination as would enable you to come to any other conclusion than that the examination was so slight that the witnesses seemed not to view it with an eye to its identity.

In the cases read to you, it is seen that the witnesses were such as ought to know the bodies to which they were deposing. The wife, the family physician, the dentist, all certainly well acquainted with the individual when alive, equally as much so, at least, as those who have deposed to the body of Mr. Muir could have been with him, whilst he was alive, and yet with the great intimacy of the wife, she preferred to rely on physical marks on the body, which she named, and so of the dentist, who would not be satisfied until he had inserted the teeth into the places from which he supposed he had drawn them whilst Morgan was alive; but with all the caution used, they were mistaken, and what is still more remarkable, this mistake was made over a body which had been dead only six weeks, for it was settled to be the body of Monroe, who had been dead but that length of time, whilst the body said to be Mr. Muir's had been dead five months and thirteen days. No man can read the cases to which I have referred you, without seeing the necessity of strict examinations upon all such occasions, and wherever they have not been made, doubts must remain, and it is not expected that a jury will supply anything which it was the duty of the commonwealth to furnish.

I have thus far, gentlemen, attempted to show you the great difficulty of identifying a dead body after putrefaction has taken place. In connection with this part of argument, and further to elucidate the position that mistakes often occur in matters of identity, allow me to call your attention to one or two cases where living persons have been mistaken for others whom they resembled.

(Guy's Med. Jurisp., page 22.) The following case is reported.—  
“In the year 1772, one Mall, a barber's apprentice, was tried at

the Old Bailey, for robbing a Mrs. Ryan of Portland street. The witnesses swore positively to the identity of the lad, and the whole court imagined him guilty. He said nothing in his defense, but that he was innocent, and that he could prove it. His evidence were the books of the court; to which reference being made, it appeared that on the day and hour when the robbery was sworn to have been committed, the lad was on his trial at the bar, where he then stood for another robbery, in which he was likewise unfortunate enough to be mistaken for the person who committed it."

Here it is seen, in open day, before the Court, and in the gaze of the crowd, a lad is positively identified, and no doubt is entertained until the records of their own court proved conclusively that it was impossible for the boy to have committed the robbery, because he was at that very time on trial before the same tribunal for a different offense. How much better the chance in this case to identify than if the youth had been dead and buried five months and thirteen days.

I will now read you the case of James Crow, alias Thomas Geddely, who was executed at York, for a burglary, in the year 1727.

"Thomas Geddely lived as a waiter with Mrs. Hannah Williams, who kept a public house at York. It being a house of much business, and the mistress very assiduous therein, she was deemed in wealthy circumstances. One morning her scrutoire was found broken open and robbed. About a twelvemonth after, a man calling himself James Crow, came to York and worked a few days for a precarious subsistence, in carrying goods as a porter. By this time he had been seen by many, who accosted him as Thomas Geddely. He declared he did not know them, that his name was James Crow, and that he never was at York before; this was held as merely a trick to save himself from the consequences of the robbery committed in the house of Mrs. Williams when he lived with her as a waiter. His mistress was sent for, and in the midst of many people, instantly singled him out, called him by his name (Thomas Geddely), and charged him with his unfaithfulness and ingratitude in robbing her. He was directly hurried before a justice of the peace, but, on his examination absolutely affirmed that he was not Thomas Geddely; that he knew no such person; that he never was at York before; and that his name was James Crow. Not, however, giving a good account of himself, but rather admitting himself to be a vagabond and petty rogue,—and Mrs. Williams and others swearing positively to his person, he was committed to York Castle for trial at the next assizes. On arraignment he pleaded not guilty, still denying that he was the person he was taken for; but Mrs. Williams and some others, swearing that he was the identical

Thomas Geddely who lived with her when she was robbed, and who went off immediately on the commitment of the robbery; and a servant girl deposing that she saw him that very morning in the room where the scrutoire was broken open, with a poker in his hand,—and the prisoner being unable to prove an alibi, he was found guilty of the robbery. He was soon after executed, but persisted, to his latest breath, that he was not Thomas Geddely, and that his name was James Crow. And so it proved! For sometime after the true Thomas Geddely, who, on robbing his mistress, had fled from York to Ireland, was taken up in Dublin for a crime of the same stamp, and there condemned and executed. Between his conviction and execution, and again at the fatal tree, he confessed himself to be the very Thomas Geddely who had committed the robbery at York, for which the unfortunate James Crow had been executed. We must add, that a gentleman, an inhabitant of York, happening to be in Dublin at the time of Geddely's trial and execution, and who knew him when he lived with Mrs. Williams, declared that the resemblance between the two men was so exceedingly great, that it was next to impossible for the nicest eye to have distinguished their persons asunder." Philips, p. 76.

No one doubts that Mrs. Williams, and those who swore to the person of Crow, for a moment believed it was possible for them to be mistaken; surely they would have much sooner expected a mistake, if they had been swearing to the body of James Crow, after it was dead, as that of Thomas Geddely, because it resembled him when alive, than they would, that the mistake should have occurred when both were alive, and yet they were mistaken, and innocent blood was shed. Another warning to us, to guard against the errors into which men too frequently fall.

But, gentlemen, did you not observe the living example on this subject introduced by the commonwealth, through one of her witnesses, Mr. Bailey, who told you that on the ninth of February, 1846, he found a horse in his field (supposed to be the one which the deceased rode), so much like one which his neighbor and friend, Mr. Bevil, owned, that he actually, under the belief that it was his horse, sent it to him. And yet he was mistaken, for it turned out to be the horse of Mr. Boisseau.

And now, these very gentlemen who introduced this witness, who has himself practically exemplified the great doubts on questions of identity, sustaining the author from whose works I have read, and endorsing the experience of every man who

has paid any attention to this subject, will tell you, whilst he might honestly be mistaken in identifying a live horse, yet other witnesses of theirs could not be mistaken in identifying the dead body of a human being, that had not breathed the breath of life in five months and a half. Surely, "Out of their own mouths are they condemned."

But why should I longer detain you by reference to examples within our day and generation. Follow me, I pray you, into that great and good Book, where God, in the plenitude and fullness of his mercy and glory, has shown man what he is, and how frail his judgment is, of the things of this earth.

You all recollect, no doubt, the history of Joseph and his brethren who sold him into Egypt, unto Potaphar, an officer of Pharaoh's guard; where he interpreted the dream of Pharaoh, saying, "There shall be seven years of plenty and seven years of famine." And behold, when the seven years of famine arrived, Jacob sent his sons, Joseph's brethren, into Egypt to buy corn. "And Joseph was the Governor over the land, and he it was that sold to all the people of the land: and Joseph's brethren came, and bowed down themselves before him, with their faces to the earth. And Joseph knew his brethren, but they knew not him." Joseph conversed with his brethren, they engaged in the conversation; he told them they were spies, but they denied it, saying, we are true men, we are all one man's sons. He cast them into prison for three days, and on the third day the fear of God came upon him, and he discharged them, save one, whom he kept as a pledge.

Here, gentlemen, is the richest record of the liability of man to err, upon this point, so necessary to be established, before you can find a verdict of guilty. Ten brothers buying corn from one who had been raised with them, conversing with him of their father, of their youngest brother; three days are they kept by him, and yet not one of them knew him. Not only in that instance did they fail to recognize him, but on the second visit they were equally ignorant that they were buying corn

of their brother. How, I ask, can you, how will you, let these teachings of the Holy Bible, the book of our faith, the ark of our safety, pass by without warning you to take heed of what God has laid before you, as a lamp to light your way whilst sojourning here below.

It cannot be contended that Joseph's brethren were not thinking of him, and therefore he was not recognized by them; for it is expressly stated, whilst in prison, "They said one to another, We are verily guilty concerning our brother, in that we saw the anguish of his soul when he besought us, and we would not hear; therefore is this distress come upon us. And Reuben answered them, saying, Spake I not unto you, saying, Do not sin against the child; and ye would not hear: therefore, behold also his blood is required."

Now, gentlemen, this conversation amongst the ten brothers, took place in the presence of Joseph, who turned himself about from them and wept. And I ask you whether this holy record does not merit the deepest reflection—whether it does not carry proof too full to be resisted—whether the commonwealth is not too weak upon this point to take life.

Again, where do you find "doubting Thomas," when he was called upon to believe that Christ had risen from the dead? Was he satisfied by viewing his body and judging of it, from its resemblance in life. No, no, gentlemen. He says, "Except I shall see in his hands the print of the nails, and put my fingers into the print of the nails, and thrust my hands into his side, I will not believe." Was Thomas reproved by Christ for wishing to have some proof other than that of mere resemblance, by which he could identify this body? Far, far from it, for behold him crying to Thomas, "Reach hither thy finger, and behold my hands; and reach hither thy hand, and thrust it into my side; and be not faithless, but believing."

What higher authority can be offered than this, the Savior of man, who not only believed it necessary to have marks of identity, but actually exhibited those marks, that one of his Apostles might believe and no longer doubt? And shall fallible, feeble, erring man, after this example, feel himself above

calling for such proof as will satisfy him fully, that this was the body of Muir?

I hope, gentlemen, you will excuse me for marching on this holy ground. It is the duty of man, when he reads the great and good Book, to draw from it the knowledge which teaches him not only how to act upon this earth towards his fellow-man, but to prepare his soul so to appear before his Maker, as to receive the happy plaudits of, "Well done, thou good and faithful servant, enter thou into the kingdom of thy Lord."

But suppose in the view I have taken of this subject I am mistaken, and there should be no doubt left upon your minds as to the body found being that of Mr. F. A. Muir.

The great and important question then arises,—Is the proof sufficient to remove from your minds every doubt as to the guilt of the prisoner? Or, in other words, Is the evidence such as to warrant a conviction?

I know that the mere charge of murder too often carries with it a weight of prejudice that gives a coloring to all the circumstances, tending almost invariably to strengthen the charge made by the commonwealth. I shall, however, commence a review of the testimony touching this branch of the defense, under the belief that your minds are free from all bias.

It is in proof that a body was found on the fifteenth of July, on the plantation of the accused, from one-quarter to one-half a mile from the house. It is also in proof that a search was made on the farm of the prisoner on the ninth of July. What was the conduct of the prisoner when he was informed that he was suspected of the murder of F. Adolphus Muir, and permission asked to make the search? Mr. J. A. Muir, the first witness introduced by the commonwealth, informed you that the prisoner readily consented that the search might be made, and at the suggestion of Dr. Edwards, accompanied the party to the Camp Ground, where three hundred or four hundred of the citizens had assembled, and readily went with them over the farm, giving them every facility in making the search. And when near night they went to the house to search in and

around the premises, he at once gave them up the key of his ice-house, and desired that they should search that. Nor was this all. When he was called upon to exhibit the bond, which he had paid off to F. A. Muir, he at once handed it over for the inspection of the crowd.

You will recollect that the prosecutor for the commonwealth in the whole of his argument did not once allude to the conduct of the accused on this occasion, for the very obvious reason that it was nothing more nor less than that of an innocent man. And as plain, practical farmers, as men of common sense, I ask whether a guilty man would have acted the part of the prisoner under such circumstances?

Suppose on your return home you were to find that a hog or some other piece of your property had been stolen, and you had grounds to suspect that it had been stolen by some of the slaves of a neighbor, and you were to go and inform him of the fact, and at the time intimated that you desired to make a search, and your neighbor were not only to agree that the search should be made, but should actually go with you, and insist upon searching his negro cabins, stacks and such other places as you might desire. Would it be inferred from such conduct that he was the thief? You know too much of the nature of man to suppose for a moment that this would be the conduct of the guilty. And shall not the prisoner at the bar have as much charity and justice extended to him, as is awarded to others who may rest under suspicion? Will you suffer the cry of murder to drive you from your propriety and reverse the order of reasoning?

The worthy prosecutor tauntingly asked where was the bond with the forged receipt on it, that it was not produced before you? And I ask the gentleman, why did he not tell you, that the prisoner so far from having any concealments about the bond, on the day of the search exhibited it to a crowd of three hundred or four hundred persons, some of whom it was supposed knew the handwriting of F. A. Muir as well as they did their own. Was there anything said about a forged receipt on that occasion? If so, let the witness be named.



That gentleman, as well as yourselves, knows too well the ways of the guilty to believe that he who had shown a receipt to three hundred persons would be afraid to exhibit it to a jury of twelve men.

Take the whole of the conduct of the accused with the witness, Mr. J. A. Muir, and it is consistent with his innocence, with the exception of the three letters; and if the prisoner was not the writer of those letters, he cannot be convicted of the murder of Mr. F. A. Muir. To the subject of these letters I will now call your attention.

You are aware that the proof of an instrument of writing, like the proof of any other fact, is either direct, when the witness sees the writing executed or acknowledged, or it is founded on his belief, from his knowledge of the general character of the handwriting. A witness is not allowed to compare the writing of the individual, whose hand is about to be proved, with the letter or written instrument which he is called upon to testify to. But whilst the law is thus rigorous in confining the witness to his knowledge of the general character of a particular handwriting, yet it is nothing more than a comparison at last, for whilst the hands do not act in holding the two pieces by the side of each other, that they may be viewed together, none will deny, that it is at last nothing but an effort of the mind in drawing a standard of the handwriting in the mind's eye, and with that standard, thus drawn, he compares that which is before him and about which he testifies. And I need not tell you that there must be great difficulty in any mind, however capacious it may be, to throw out of view all the other writings which are flitting before it, and single out a particular specimen in the mind, and speak with that certainty as to its similarity to the one before it, as to leave no doubt.

It is not pretended that any one saw the prisoner write the letters, or any one of them, but it is admitted by the witnesses themselves, that the letters are in a disguised hand. And to my humble judgment, there is perplexity enough in the mind, to cause doubts, even when there is no disguise, much less to



pass upon three letters, purporting to have been written by three different persons, all different in their appearance.

You were told by Mr. Vaughan, Mr. Derby and others, that they believed that they were written by the prisoner, and they gave you their belief, and nothing else. Let me call your attention, not only to the belief, but to the acts of those who certainly, if they did not know the handwriting of Mr. Epes, must have known the handwriting of F. A. Muir, as well as those gentlemen could have known that of Mr. Epes.

You were told by Mr. John A. Muir and Mr. Cousins, that they were so fully satisfied that the receipt on the bond, and the letter of the fourth of February and that of the twelfth of the same month, were in the handwriting of F. A. Muir, that on the faith of that belief, they released a deed of trust which secured the payment of \$3,000, thereby giving the strongest proof that at that time they had no doubts upon their minds as to the writer of the receipt and letter. And I submit it to you, in all candor to say, whether the brother and connections of the deceased, were not more likely to know his handwriting than were Mr. Vaughan, Mr. Derby, and others, to know the handwriting of Mr. Epes.

Suppose, gentlemen, you had never heard of this murder, and the question were put to you whether the receipt and the two letters of the fourth and twelfth of February were written by F. A. Muir, or by W. D. Epes, and you had to decide by the proof here given. How would you reason upon the matter? You would say, Vaughan and Derby speak as if there was little or no doubt on their minds that Epes wrote the instruments of writing; they only speak of it, however, from their general knowledge, as they would of any other handwriting. On the other hand, J. A. Muir is the brother of F. A. Muir, he has been raised with him, ought not to be mistaken in his handwriting; in addition to that, he never would have given his consent against his own interest and suffered the bond of \$3,000 to be settled off if he had not been acting under what he considered an absolute certainty as to the genuineness of his brother's handwriting. Mr. Cousins, too, was trustee to the

deed of trust, securing the \$3,000, and as a business man, he never would have consented to release the deed with the shadow of a doubt on his mind.

Thus you would weigh them, and I say, if this murder had never been heard of, there is not a member of this jury that would not, under all the circumstances, have decided in favor of the opinions of Mr. J. A. Muir and Mr. Cousins.

The question whether this is the handwriting of F. A. Muir or that of Epes, should be decided without reference to the murder. It would be folly to say, I believed it to be F. A. Muir's writing until I suspected Epes of the murder; and certainly equally so, to believe Epes wrote the instruments of writing because he is charged with the murder. And yet strange as it may seem, this handwriting has changed to be Epes's since suspicion has fallen on him.

Compare, on your retirement, the entry made by Epes in the register at Jarratt's, proved and admitted to be made by him, with the letters in question, and if you believe that any individual can say with certainty that the individual who wrote that name in the register also wrote the letter here introduced, so clearly as to leave no doubt on your minds, then I admit a strong link is made in this chain of circumstances.

The witness, Mr. Lumsden, told you that on the twenty-first of May, 1846, he traded with the prisoner for a gold watch which he repaired for F. Adolphus Muir, on the first of September, 1843. You will recollect that upon the cross-examination the witness stated that he could only identify the watch by the number and name of the maker, and that at the time he traded with the prisoner for it, he examined it minutely, both externally and internally, and that he did not recognize it as the watch which he had repaired in 1843 for F. A. Muir. The whole of Mr. Lumsden's testimony then simply amounts to this: that he believes this watch to be the one which he repaired for F. A. Muir, because it has the same name on it as the maker, and the same number, which he finds entered in his book in 1843.

Now I assert, that Mr. Lumsden's knowledge of the iden-

tity of that watch is derived from an entry in his books, and not from anything that he relies on from looking at the watch, for if there had been no entry in his book, you would never have heard a word from him about its being Muir's watch. As proof of this, he traded for it, he says, and carefully examined it, having at the time that same entry in his book, and yet he did not for a moment suppose that he was trading for a watch which he had previously repaired for Mr. Muir, and how could he know it, either then or at this time? When he tells you that it was the only watch which he had ever seen with the name of Harrison on it as the maker, thereby showing that he knew nothing of the writing or engraving of Harrison, and any man might put the name of Harrison on a watch, and by Mr. Lumsden's own showing, he would not be able to tell whether Harrison was the maker, or whether his name was put there by another. Is it necessary for me to tell you that nothing is more common than making spurious articles with good brands.

Let us, however, go to Mr. Lumsden's book. Was it impossible for him to make a mistake in his entry? The change of a single figure would alter radically the number, and are not mistakes of this character frequently made? Have you not in writing a receipt or letter often dated it wrong, not only as to the day, but the month, and sometimes even the year?

I will now test this method of identifying a watch. I hold in my hand my watch, which Mr. Lumsden repaired on the fifth of last April. He now sits before me, and he cannot tell my watch from another of the same pattern, nor can he for his life, tell you the name of the maker, nor the number of the watch. And yet if you let him go to Petersburg and examine an entry made by himself or his clerk, he could come and identify my watch at once; yes, swear positively to it. How do we identify an object? By looking over our books for entries, or by an effort of the mind, and the action of the eye? You never could identify an object until you could see it, and the inspection of a thousand entries would leave one where he started. Mr. Lumsden had the opportunity when he traded

for it, and gave it the close examination of which he spoke, to know the watch, and fails, as he admits himself, to recognize it as the watch of F. A. Muir.

Another strong reason why the watch traded for with Epes is not the watch which was repaired for F. A. Muir is, that Muir's watch was worth \$130 to \$150. That is the proof, whilst the watch which Mr. Lumsden traded with the prisoner for, he only valued at \$40 to \$50, and allowed him that much in the trade for it.

The prosecution for the commonwealth informed you that the watch was found in the possession of the prisoner; that the prisoner was an intelligent, well-educated man. You have heard Mr. Lumsden's statement, and you can judge of the weight of his testimony, and decide whether the prisoner ever had the watch in his possession, which is now before the Court. Mr. Lumsden does not pretend to identify it, only from circumstances, and whilst I say for him, what I know him to be justly entitled to, that of being a gentleman of the strictest veracity, one whom I would as soon believe as any man in Virginia, yet I will not suffer him, nor should you, to draw conclusions for you. It is your province to scrutinize closely what he has said, and draw your own deductions.

I must confess, I was somewhat surprised, after hearing Mr. May speak of the prisoner as a man of education and intelligence, to hear him allude to the evidence of Mr. Lumsden to prove that this very intelligent man, Epes, should kill a man, rob him of his watch, carry it to a town within twenty miles of his residence, trade it off to a public watchmaker, and that, too, within two months and twenty days after the murder had been committed. Now I put it to you, if he is the man of intelligence which Mr. May describes him to be, and I think his description correct, whether this fact of itself does not clearly show that nobody but a fool would have offered the watch within the time, and under the circumstances, and to the person to whom it is alleged he offered it. No, gentlemen, Mr. May has told you that his intellect was of such an order as to forbid the commission of an act so full of folly.

It is only necessary for me to call your attention to one other point in the argument of the prosecutor for the commonwealth, in relation to the watch, to show you what little value he places on it as a circumstance worthy of your consideration in making up your verdict. He told you that it was known that the prisoner had traded off the watch in Petersburg before he ran off, and that he and his associate were consulted as to the propriety of arresting him, from the existence of that fact, and what did he say was the advice given? Why they advised against arresting him, and yet in the face of that admission, made before you all, in the same speech, and before he takes his seat, he tells you that this very fact, that he traded the watch with Lumsden, should leave no doubt on your minds that he murdered Muir. Strange logic this. That which was not strong enough to arrest a man on, is now the very strongest reason why he should be convicted. The bare statement of the gentleman's admission, so effectually overthrows his present position on this point, that nothing further remains to be said by me.

Your attention was next called to the flight of the prisoner from the State of Virginia to Texas, anticipating I have no doubt that your good sense would at once account for that circumstance, by the unheard-of course adopted on that occasion. He thought proper, whilst he was referring to the transaction, again, as in relation to the watch, to destroy whatever force he intended his argument should have, by accounting for the flight himself at the time he alluded to it, by telling you that it might be expected from a timid man under the circumstances. Yes, gentlemen, with the proof before him that a search had been made by three or four hundred persons on the farm of the prisoner, and he in company with them all the time, exhibiting nothing like a disposition to flee. He tells you that others might have fled, and their timidity would have been their justification, and yet this exhibition of popular excitement, which he admits would have made the innocent flee, provided there was timidity, you are called upon to note as evidence of the prisoner's guilt. Does the gentleman expect

you to close your eyes to such facts as he admits would not in others be construed into guilt, and make an example of the prisoner to satisfy the cormorant appetite of the commonwealth?

No effort of counsel can drive you from the correct conclusion on this point. Put the case to yourselves. You find the press publishing letters, insinuating they are forgeries, that a murder has been committed, that you had perpetrated both the murder and the forgery. Further, the indignation of the citizens of your county arose to such a state of excitement that they assembled in masses at your house to the number of three or four hundred, and openly charged you with the murder. Could you breast such a stream of popular anger and indignation? I think not. And if you did, I venture no man, other than a commonwealth prosecutor, would ever think of alluding to it as evidence of criminality. But you find that the prisoner did not even then leave, for it was only after the company had left, and the storm of public wrath continued to increase in strength and fury, plainly indicating that violence would be ultimately resorted to, that he was forced to leave his home and friends, and take refuge in a land of strangers, fondly hoping that the excitement might moderate or die away. But no sooner was it known that he had left his home, than rumor with her thousand tongues commenced the work of destruction, slander and falsehood. Every newspaper in the largest city, the smallest village, was teeming with the charge of murdering F. Adolphus Muir. Each seemed to vie with the other, in adding to the first charge, the most atrocious crimes. From the murdering of the hog-drover to that of his mother-in-law, and finally to that of his own son. These charges in the public press were daily seen by him, and I ask you, what more could be wanting to expel the most virtuous from our land?

Mr. May told you that the timid might have fled under such circumstances although innocent, and I tell you that public opinion, when highly excited, whether true or false, if brought to bear upon a single individual, is more terrible than a whip

of scorpions, and the innocent as well as the guilty will wither before it and be blown as chaff before the wind.

We come now, gentlemen, to the confession said to be made to Mr. Benjamin J. Vaughan.

You were informed by the witness that he left Virginia in search of the prisoner, and that he found him in Texas, in a small town called Nashville; that after he had arrested him, and whilst on his way home, the prisoner commenced a conversation about the murder of Muir, by saying that he had read the statements in the newspapers giving the different accounts of the murder of Muir, and that he had been charged in the publications alluded to with having killed a hog-driver, his mother-in-law, and his own son; that Muir's case was bad enough. The witness further informed you, that he asked the prisoner some questions with a view of obtaining a confession from him. The first was whether he (Epes) was with the party who made the search on his plantation, and he stated that he was. The witness then asked him how near they went to the grave. Vaughan then said to him, the grave must have been well concealed; to which Epes replied that it was, that it had the appearance of an old hog-bed, with trash and a few brush thrown over it. He further stated that he had not paid the bond.

This is the substance of the statement made by Mr. Vaughan. You all recollect the great notoriety which had been given to this case, and the many circumstances which it was said connected the prisoner with the murder of Muir. Compare these with the confession which Mr. Vaughan has told you was made to him by the accused, a confession, which if interpreted in the light and under the circumstances under which the conversation is said to have taken place, does not carry sufficient weight with it to create suspicion, much less to justify a verdict of guilty.

Can you believe that a gentleman of Mr. Vaughan's intelligence, if his object had been to have obtained from the prisoner a full and fair history of the death of Mr. Muir, would have come from Texas to Virginia, with a mere paragraph



statement, not long enough to make a respectable postscript to a lady's letter, as the true revelation of what had been so long the theme of public speculation and inquiry? You all know Mr. Vaughan to be a man of too much sense to have relied on such a vague statement, if he could have obtained a better. This conversation is construed by the commonwealth into a confession, when I think I will convince you that it was nothing more than a repetition of the statements which Epes told Vaughan he had seen published in the different newspapers.

Mark the manner in which the conversation commenced. Epes said he had seen the different statements in the papers, and named among others, that he had been charged with having killed a hog-drover, his mother-in-law, and even that he had been charged with having killed his own son; and closed by saying, that Muir's case was bad enough.

It is for you to decide upon the proper construction to be put upon this language. As the witness and the prisoner totally differ as to the ideas intended to be conveyed, such a rule of construction should be applied as to reflect the meaning Mr. Epes intended his remarks should convey. Let us analyze the expressions used; Epes says, "I see I am charged with murdering Muir. I also see I am charged with murdering a hog-drover. I further see I am charged with murdering my mother-in-law. And, lastly, I see I am charged with murdering my own son. Muir's case is bad enough." Now, gentlemen, what is the legitimate deduction to be drawn from these remarks? Evidently that Mr. Epes, so far from having confessed the killing of Muir, only said it is bad enough to charge me with killing Muir, without adding thereby the crime of murdering three other persons, one of whom was my own son. These charges had been all made in the public press of the country. Suppose Epes had closed his remarks by saying he had seen all the charges that had been made, and that his mother-in-law's case was bad enough; would anybody have inferred that he thereby acknowledged that he had killed his mother-in-law? Surely not.

But would have inferred that he was only referring to the charges, and that it was bad enough to charge him with murdering his mother-in-law, without the additional charge of the inhuman crime of having killed his own son.

If he had intended in the conversation to have confessed that he had murdered Muir, what more easy than to have said, "It is true, I killed Muir, that's bad enough, without charging me with the other three crimes." Instead of such a confession, he speaks of the charge of having killed Muir, and connects it with the other three charges, without speaking of his own agency or action upon any one of them. There is nothing plainer than this being the proper light in which the conversation should be viewed. Is there an individual on that panel, or within this house, who if the prisoner had told him that he murdered Muir, would not have asked him where he killed him? How he killed him? Whether he was shot once or twice, or put some question as to the details of a murder that had engrossed so much public attention, and aroused so much excitement throughout the land. A disposition not to misrepresent or misunderstand, would have induced you to have done so—not to speak of the curiosity of man to be informed to the fullest extent into the secret history of this mysterious affair.

Mr. Vaughan, however, knowing all the rumors that had been, and that were at that time in circulation, without knowing whether they were true or false, coolly puts a question to the prisoner, which he knew himself, and which was known by every man and woman in the county of Dinwiddie, and that was, whether he (Epes) was with the party that made the search on his (Epes) plantation on the ninth of July, 1846. I do not think that another man in Virginia, of Mr. Vaughan's intelligence, would have put such a question, after such a startling development as he thinks the prisoner intended to make; a question, the answer to which he not only knew himself, but which was known by everybody else.

Again, gentlemen, notwithstanding Mr. Epes had told Mr. Vaughan that he had seen all the statements in the news-

papers, and with a knowledge of the fact that all the particulars of the search, the finding of the body, and the place and manner of its interment had been published, he puts another question to the accused, which he was enabled to answer, from the fact that he had taken part in the search, and the publications that he had seen. This is the question: How near did the party, during the search, go to the grave? Epes answers by saying, they were at one time within three or four feet of it. Does this answer show that Mr. Epes knew where the grave was, on the day on which the search was made? You will bear in mind that the facts in relation to finding the grave and finding the body had all been published, and that Mr. Epes had told Mr. Vaughan that he had seen all the statements. One of the statements was, and the true one, that a grave with a dead body in it had been found in an old field, a quarter or half a mile from the house, under a cherry tree, on the prisoner's land. Now, Mr. Epes, though four or five thousand miles from home, could, without knowing on the day of the search, whether the grave was under the tree or not, tell how near they went to it, for it was only necessary for him to know on what part of the plantation the cherry tree stood—knowing this fact, seeing from the publications that the grave was under that particular tree, and being with the party when they walked by the tree, he could tell how near they went to the tree, and consequently how near they went to the grave.

Suppose, gentlemen, ten days ago a search had been made on one of your plantations for something that had been stolen, and that you had assisted in making the search. That you had failed finding the object sought for. To-day, however, you are informed that it was found buried under a walnut tree near the head of your lane, and some friend should ask you how near the party went to the place at which it was found. Why, you would at once say, well, if it was buried under a walnut tree near the head of the lane, we must have gone within two or three feet of it, for we went right under the tree. And yet you might not have known that the article was there, any more than Epes knew the grave was under the cherry-tree on

the day of the search. The information, in both cases of the approach to the object, is derived from the knowledge of the particular location of the tree.

But there is another view of this subject that will overthrow at once all belief that Epes could have known that the grave was under the tree on the day of the search, and this is, the improbability that Epes or any other man would have gone with a party of gentlemen, highly excited, and who had openly charged him with the murder of a man for whose body they were then in search. Would he not have taken some method to decoy them off, or at least have placed himself in a situation where he might have escaped, in the event of the body being discovered, when he must have known that death would have been his portion had the body been found?

It is not in the nature of the guilty, nor has God given man the nerve when conscious of his own guilt, to play such a part, and nobody but one devoid of sense, or an innocent man would dare expose himself to such unnecessary peril. And as he has been endorsed by the prosecutor of the commonwealth as a man of intellect, we should infer that his conduct on that occasion was more compatible with innocence than with guilt.

The description of the grave which the witness says was given by the prisoner, like the other portions of this novel confession, is nothing more than a mere repetition of the rumors which Mr. Vaughan had heard from others, and which Epes had seen published.

It will not be expected, I presume, for me to enter into an argument to explain the remark by the prisoner in relation to his not having paid the bond, when it is recollected by you, that on the day of the search, when Mr. Epes was informed that counsel had been consulted, and that an opinion had been given that he would have to pay the money again, he at once stated to John A. Muir and P. Boisseau that he would do so.

If there had been criminality in that remark, would it not have detected the receipt on the bond as a forgery and led to his immediate arrest? I hope I have satisfied you that Mr. Vaughan was entirely mistaken in the construction which it

seems he placed on the conversation with the prisoner, which he is pleased to call a confession.

You will recollect that it is not a question of veracity, whether such a conversation took place or not; but whether the construction put upon it by Mr. Vaughan was the correct one or not. No man who knows Mr. Vaughan will question his veracity, but it is your peculiar province to scan well that conversation that injustice may not be done the prisoner. The strongest proof that Mr. Vaughan did not put the proper construction on that conversation is derived from the fact, that to-day is the fifth day since the commencement of this trial, and witnesses have been examined from the entire surrounding country, and not a single fact has been elicited, going to show that the prisoner at the bar ever made a confession to any other human being on earth than to Mr. Vaughan. What then could have been his motive for making a confession to him? Does any one believe that the prisoner would dare expect the witness to keep it a secret? The intelligence which all award to him, forbids the idea that he was ignorant of the certainty of forfeiting his life should it be introduced on his trial as evidence.

Further, he knew Mr. Vaughan had pursued him for the purpose of having him brought to trial for the supposed murder of F. A. Muir. Then what motive could have induced him to make a confession to one who at that time occupied a situation of deadly hostility towards him? Was it a reckless disregard of consequences that caused him to make the confession? If so, then the same feelings would have caused him to make confessions to others. Not so, however. Mr. Vaughan, his hot pursuer, is the only living being who can be found that ever heard the least whisper of a confession.

I am addressing men of experience, men who well know that the most angry controversies and deadly conflicts too often arise from wrong constructions put upon hotel and steamboat conversations. Does not the worthy prosecutor know, that our most eminent statesmen are often drawn into difficulties by misrepresentations of remarks made when travelling in com-

pany with others? There is nothing more dangerous to the peace of society—nothing better calculated to lead to mortal combat, than to force into man's mouth, or out of it, what he did not intend to utter. Conscious of this, why does he ask you to give a different meaning to the remarks of the prisoner, than was ever intended by him that they should have?

Reflect upon the situation of the prisoner, he sees before him a witness repeating a conversation which took place, as a confession. He denies that it was a confession, but he cannot be heard. He must be silent and hear himself misrepresented. The strictest vigilance should be given to the conduct of the individual obtaining the confession, whether there was any undue influence used in obtaining it.

How well does Chief Justice Foster describe this kind of evidence, when he says (see *Philips on Evidence*, page 86) :

"Hasty confessions, he says, made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured. Words are often misreported (whether through ignorance, inattention, or malice, it mattereth not to the defendant—he is equally affected in either case), they are extremely liable to misconstruction; and with all, this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is confronted."

This is the opinion of a Judge who had, from experience, seen too much oppression and injustice from such hasty and unguarded conversations being construed into confessions; and his opinions have been and will be respected so long as truth and light is sought for particularly when one party, from his situation, is bound to be silent, and is unable from the testimony to prove a negative. And, whilst the commonwealth relies on it as the strongest testimony, I think you will concur with me, that it is the weakest.

I might here close my remarks, but I feel it my duty, at the expense of trespassing on the patience of his Honor and yourselves, to again call your attention to the fact, that the whole of the evidence is circumstantial, and to say to you that every link in the chain of circumstances must be clearly and fully connected before you can bring in a verdict of guilty, and that

if there be any doubt upon your minds of any fact necessary to the conviction of the accused, he is entitled to the benefit of that doubt.

How often have the innocent been punished upon circumstantial evidence infinitely stronger than that against the prisoner at the bar, the cases I have quoted to you too plainly show.

It is not necessary for me to make a single remark upon those cases other than to tell you that they speak in eloquent terms of the sad consequences which too often result from convictions upon circumstantial evidence. How awful must the survivors of that jury have felt when they saw the death, the infamy, and disgrace that their reliance on circumstances had produced. But the workings of Providence are mysterious, and it is the duty of man to profit by errors of his fellow-man, and to take heed, that he be not led off into the errors of those who have gone before him.

I have now, gentlemen, closed my defense, and I hope and trust in God that I have performed my part with an honesty of purpose. At least, I feel an abiding confidence, that whatever may be the result of your deliberations, I shall have nothing to reproach myself with. My humble efforts can do the prisoner no good without your aid. You stand between him and the grave. In your hands is placed the thread of life. Ponder, I pray you, deeply, upon the consequences that must follow a verdict of guilty. Recollect the awful responsibility that rests upon you all; and be sure, that when you shall be called to judgment before high heaven, you can say, with a clear conscience, that what I have done was the honest conviction of a heart seeking alone to do right! Do this, and the commonwealth will be satisfied! Do this, and thus a poor, miserable being, will be content to abide by your decision!

Then, in your hands, I leave him; and in turning him over to your justice and mercy, permit me to return you my thanks for the undivided attention which you have given me, in what I have had to say. Not mine alone, but the thanks and the blessing of an interesting family will be showered upon you,



for the cool, dispassionate, and impartial investigation which you will give to the trial of one so near and so dear to them.

Now, look, I pray you, on the prisoner! See that pitiable, perishing wreck of nature! Are his thanks worthy to be received? A miserable outcast though he be, yet he lives, and though almost overwhelmed by the billows of popular indignation, that God who tempers the wind to the shorn lamb, now, in the hour of his trouble and discontent, may be pouring balm into his broken heart, crying as to Peter of old, "Be of good cheer, be not afraid, it is I." This, and this alone, is his hope in another world, and you will ever, ever have his thanks for extending to him that justice, blended with mercy, which is the glory and beauty of the inestimable right of trial by jury.

*September 25.*

MR. JOYNES, FOR THE PRISONER.

*Mr. Joynes.* My colleague, who opened the defense, has pointed out to you the intrinsic difficulties which belong, in every case, to some of the questions which you are now to decide. He has shown you how difficult it is, in many cases, to identify the dead, even recently after death,—how much that difficulty increases with the lapse of time and the progress of decay, and how often men are mistaken even as to the living; he has shown you how difficult it is to identify handwriting, especially when disguised, and how much this difficulty is augmented, in this case, by the great dissimilarity of the three letters attributed to the prisoner; and has illustrated with great force the doubts that must hang over our most confident opinions on all such subjects. I might enforce the same views still further, but it is not necessary; and only calling upon you to bear them in mind, I proceed at once to present such further views as have occurred to myself.

And here, at the outset, gentlemen, let me remark, that you must not only be satisfied that F. A. Muir is dead—that the prisoner wrote the letters produced here in evidence—that he was found in possession of Muir's watch—that he knew of Muir's death, and trusted to falsehood and stratagem to con-

ceal it—and that he finally fled to Texas. These are the great points upon which the attorney for the commonwealth has insisted in his argument. But it is not enough that the supposition of the prisoner having murdered Muir will explain all the facts in the cause, and account for all his subsequent conduct. The commonwealth must go further, and satisfy you beyond all doubt, that the facts cannot be otherwise explained—that there is no other way in accounting for the prisoner's conduct. This is the great principle by which you are to be guided in this cause, and it is important that you should understand it clearly and fully in the onset.

It is not for us to establish the truth of any other supposition that may be suggested, to account for the facts and conduct disclosed by the evidence. It is incumbent upon the commonwealth, as you have already seen, to show that it is not and cannot be true, and not only that that particular supposition cannot be true, but that no other possible one can be true except the supposition of guilt insisted upon by the commonwealth. It is not enough for counsel to urge that any supposition we suggest is not propable—that it is not as likely to be true as the supposition of guilt—that it would be strange or singular if it were true; it must be made out to a moral certainty that it is not and cannot be true. It is not enough that the appearances are against the prisoner—it is not enough that he seems to be guilty—it is not enough that he is probably guilty—it must be shown that he certainly is so. This is a great bulwark which the law has thrown around the liberty and life of the citizen. The law will take no man's life upon a probability—it is not governed by appearances—by what seems to be so; it proceeds upon facts, fully and clearly made out, and upon nothing less.

The commonwealth must not only satisfy you that the hypothesis of guilt will account fully for all the facts, and that no other hypothesis can account for them, but you must be satisfied of this beyond a doubt. A doubt upon any one point essential to the prosecution, must acquit the prisoner. A doubt is equal to a thousand witnesses. If it be doubtful whether

some other supposition may not be true—if any one man doubts upon this subject, the prisoner cannot be convicted. If any one man doubts upon any one fact, let him rather die in his place than find the prisoner guilty with the doubt upon his mind.

Every one of you will remember, gentlemen, that this great rule of law which I have been endeavoring to explain and enforce, as your guide in deciding upon this evidence—more important than any other to be known and understood by you in this cause—was not mentioned or alluded to by the attorney for the commonwealth. He was content to assume that the prisoner was guilty of murder, and to agree that all the evidence is consistent with that supposition; he did not undertake to show you that no other supposition can be true, or consistent with the evidence. His effort and his discussion of the facts and circumstances of the case seemed to be to make a case of apparent guilt, at most, a case of probable guilt, and that, too, by merely showing that the facts are consistent with guilt; forgetting the great rule which forbids you to convict, though all this should be true. This was all that the attorney for the commonwealth felt himself able to contend for, upon the facts and circumstances in the cause; and it was this consciousness of the intrinsic defects of his evidence, that led him, notwithstanding the portentous array of facts of which we have all heard so much, so conclusive, it was supposed, as to shut every avenue of escape for the prisoner, to bring forward another piece of evidence, kept back until the close of his case, that he seemed to consider too powerful for reply—and sufficient of itself to seal the doom of the prisoner. I allude to the evidence of Mr. B. J. Vaughan, which is relied upon as proving a confession by the prisoner of the crime charged upon him. So far from this evidence being entitled to the conclusive weight ascribed to it by Mr. May, I regard it, if I know my own opinion, as the very weakest evidence in the whole cause.

A number of well-known writers lay it down that evidence of confessions is the weakest and most suspicious kind of evi-

dence.<sup>4</sup> Thus you perceive how little weight the law, in its wisdom, ascribes to the most direct confession of guilt. Hence it is, that a confession alone, however plain and clear it may be, is not sufficient to justify conviction in any case whatsoever. Thus in the case of *The People v. Hennessey*, 15 Wend. 147, the prisoner was convicted of embezzlement upon the strength of a detailed written statement furnished by himself. And yet the Supreme Court of New York set aside the conviction, and awarded a new trial, upon the ground that a confession alone, however clear and deliberate, will not authorize a conviction. In another case, a negro boy was prosecuted for the murder of a child by throwing him into a well. He was seen playing with the child near the well in which the body was found not long before the child was missed; during the search for the child the prisoner was found hid up a tree—he pretended the child had gone up the road, looked around and called for him—went to bed at night without his supper—and next morning admitted he had seen the child fall into the well, but gave no reason why he neglected to mention it. He afterwards confessed that he had drowned the child by throwing him into the well, and upon the strength of this confession the jury found him guilty. And yet, though here was a train of suspicious circumstances, apparently confirming and corroborating the confession, the Supreme Court of New Jersey awarded a new trial, on the ground that the evidence was not sufficient, in law, to justify the conviction. *The State v. Aaron*, 1 Southard 232.

If evidence of a confession is at all times suspicious, and entitled to but little consideration, the evidence relied on to prove a confession in this case is entitled to no consideration at all. Vaughan had just arrested the prisoner the day before, in his distant retreat, where he had remained so long undisturbed, and where he, doubtless, fancied himself forever

<sup>4</sup> Citing *Foster*, 243-4. *Blackstone's Comm.* 357. *Jay on Confessions*, 103. 26 *State Trials* 108. *State v. Fields*. *Peck's Rep.* 140. 3 *Phillips Evid.* Cowen 236. 5 *C. & P.* 542.

out of danger, and was now bringing him back to be tried for his life. Is it probable that he would disclose the fatal secret to this, his worst enemy, in preference to all the world besides? They travelled together from Texas to Petersburg, spent days and nights in company, and yet there was no fuller confession; no subsequent conversation upon the subject. The prisoner has since been in Virginia more than six months, and yet there has been no other confession, or anything like a confession, to anybody else, nor even to Vaughan himself. How can it be accounted for, that the prisoner, while he had already confessed enough to Vaughan, if the commonwealth be right, to forfeit his life, after he had fully and freely admitted his guilt, should have withheld the particulars of his crime, and at all other times, and to all other people, and even to Vaughan himself, should have kept his lips forever sealed upon the whole subject? Is it easy to believe, is it consistent with probability, is it natural, that a sensible man would purposely run his head into the halter, by confessing, without assignable motive, what will take away his life? Remember, too, the situation of the prisoner,—just arrested when he had long thought himself secure; in chains and disgrace; “with spirits sunk, fear predominant, hope fluttering around, purposes and views momentarily changing, a thousand plans alternating, a soul tortured with anguish, and difficulties gathering into a multitude.” Are the words of such a man, at such a time, his words of anguish and despair, to be weighed against him in golden scales? I submit, that the language of the prisoner, even if the witness has related his very words, ought to be interpreted with every allowance in his favor, and that if it be possible to put a different construction upon it, it ought not to be construed as a confession of guilt. Moreover, the weight of this evidence depends on the accuracy of Vaughan’s recollection. Alter a word, and it may change the sense of the whole; a single mistake of the witness, might be fatal to the prisoner. And here I call your attention to the fact, that after the witness had finished his statement of the conversation with the prisoner, and said, in reply to a distinct question, that he recol-

lected nothing more, reflection and further interrogation fished up from his memory another part of the same conversation, not previously remembered. How much more may still have been forgotten! How many words or forms of expression may not the witness have mistaken, after the lapse of seven months, and with a memory thus palpably treacherous! Remember, too, that the guilt of the prisoner was, in the mind of this witness, a "foregone conclusion," so that he would be naturally inclined, without meaning to do wrong, to construe anything that might fall from the prisoner, as confirming that opinion, though not so intended by the prisoner. And the very process of reflecting upon the subject, in such a state of mind, would be apt to give to the language of the prisoner, in the recollection of the witness, the form most in accordance with this preconceived opinion,—the form most agreeable to the meaning ascribed to it; or rather to fix in the memory of the witness, the idea attributed to the prisoner, instead of the language in which it was expressed.

What, then, is the evidence? The prisoner speaking of other "charges" that had been made against him in the newspapers, and which, he said, were not true, added, "This case is bad enough." He had been charged with the murder of his mother-in-law, and his own son, and his plain meaning was, that this charge, upon which he had been arrested, and was about to be tried, was "bad enough." It was "bad enough" to be charged with the murder of Muir, who was not of his his own blood. If "case" had been "charge," or if the word had been left out altogether, the expression would have amounted to nothing. Or, the prisoner may have intended to say, that his conduct in this case had been "bad enough," without meaning to charge himself with the guilt of murder, and if all, or half or what we have been told be true, there was ample ground for the humiliating admission.

He said that some persons, on the day of the search, in July, 1846, were within three or four feet of the grave. But this remark is not even incompatible with entire innocence; for in the two years that had gone by, why might not the prisoner

have learned from others the precise locality of the grave? But without insisting upon that view, I will show you hereafter, when it will fall in more properly with the line of my argument, how this remark, as well as that about his covering the grave, so as to conceal it, are plainly consistent with the prisoner's entire innocence of the crime charged upon him in this indictment. The prisoner further said, "If the grave had then been discovered, he supposed he would have had to give up." Not to "give up" that he was guilty of the murder, but to give himself up into custody, or perhaps to give himself up to the angry multitude to be destroyed on the spot.

Passing by, for the present, this alleged confession of the prisoner, I come to the other evidence in the cause. It is all circumstantial. No human eye has seen the prisoner raise his hand against the deceased. Everything depends on inferences to be drawn from a multitude of circumstances. And here I must remind you again, that is not even enough that the prisoner's guilt should be a fair, natural, and probable inference from the facts, but it must be the only one that the facts do not contradict; it must be the only one that can be consistent with, or account for, the facts. "The impression on your minds must be," in the language already read to you, "not that the prisoner is probably guilty, but that he really and absolutely is so."

It must be borne in mind, too, that a train of circumstances often seems to lead directly and clearly to a particular conclusion, when it turns out that the fact is certainly otherwise. This is matter of common experience. We have all of us been thus deceived by appearances that left no doubt on our minds, and when the truth has been discovered, we have been amazed at the result, and unable to comprehend how the appearances and probabilities of the case could be so inconsistent with the truth. Men, who seemed to be guilty, have been hung upon such mistakes, and the bloody record should admonish us not to be misled by the strongest appearances, or the most plausible arguments, where the consequences of mistake are so terrible. Cases of this sort that have occurred in practice, will best ex-



plain and illustrate the true meaning and proper application of the great rule of law to which I have so often referred, that the jury ought not to convict, in a case of circumstantial evidence, unless the hypothesis of guilt be the only "possible hypothesis," in the language of Mr. Starkie, upon which the facts of the case can be accounted for.

The cases cited in Starkie on Evidence illustrate, in a striking manner, the extreme caution with which an opinion should be made up on mere circumstantial evidence, even when it seems to be plainest, and how the most confident conclusions upon such evidence, should be distrusted. And they show, moreover, how often the multitude, out of doors, who judge without law, and decide without proof, condemn an innocent man to infamy and death. They trust to appearances, they rely on probabilities, they argue, as does the commonwealth here, that the supposition of the prisoner's guilt is a key to all the facts, and, therefore, he must be guilty. But such, let me repeat the admonition, is not the rule of the law by which you are sworn to abide.

Gentlemen of the jury, divest yourselves of all your impressions, forget all that you have heard out of doors and ask yourselves the question,—if these men were all innocent, may not Epes be innocent likewise? You are asked to condemn a fellow-man to die. It is a fearful responsibility. Let every man of you, therefore, look well to the proof, and ask himself, again and again, with trembling solicitude, is it not possible that I too may be deceived by appearances of guilt; is there no other possible hypothesis on which these facts can be accounted for? It is a solemn question, which no man can ask himself lightly. And remember, at the same time, that it is not only the dictate of mercy, but equally a rule of law and a maxim of civil liberty, based on the soundest wisdom, and essential to the best rights of the citizen, that it is safer to err on the side of mercy than of justice, better ninety-nine guilty should escape than that one innocent man should suffer.

If I am told that the effect of my argument would be, that no man could ever be convicted with positive proof of his

guilt, I reply, that even if that should be the consequence, it would be far better than that the innocent should be convicted without sufficient evidence. But it does not follow. If I find a man hung upon a tree, it may be murder or suicide. If his hands are tied behind him, it is clearly a case of murder,—of murder in the first degree; it can be nothing less. Or, as in McCune's case, where the house was surrounded by an armed party in the dead of night, and a man was shot in his bed, as he lay sleeping by the side of his wife. That could not have been by accident or in self-defense. In all such cases, the single question is, by whose hands did the deceased come to his death. Not only must it be shown, beyond a doubt, that Muir came to his death by the hands of the prisoner, and that feloniously, but it must be shown that he came to his death by one or both of the gun-shot wounds described in the indictment, and in no other way. It is for that specific offense that the prisoner is tried, and he cannot be hanged for another. If the prisoner inflicted the death-blow with a bludgeon or an axe, or destroyed the deceased by poison, he must be acquitted on this indictment. On this main, leading fact, the evidence produced by the commonwealth is the lamest, weakest, poorest, ever heard in a court of justice. A doctor, who never saw the body until it had been buried upwards of five months, is brought here to testify to his "opinions" about the cause of death; opinions which, I will undertake to show you, are worth nothing—absolutely nothing.

If the body had been found with a fracture of the skull, or with the marks of a halter upon the neck, in addition to the gun-shot wound, how could you determine the cause of death? It might have been one,—it might as well have been the other. Nothing but the most thorough and skilful examination of the whole body could have determined it, even if it could have been determined at all; and the commonwealth would have taken the precaution to charge a killing in each of these modes, so as to justify a conviction, if the death was produced in either. Now, in this case, there was a large ecchymosis—a bruise—on the right side, over the region of the liver. Here

was, or might have been, an ample cause of death. It was not examined. Doctor Thompson, having jumped to his conclusion that the gun-shot wounds were the only cause of death, did not think it worth while to investigate the cause or the effect of this exterior injury. Did Dr. T. make the necessary examination, or possess the necessary information of the actual condition of the body, to entitle his opinion to your confidence? The highest medical authorities direct that, in every such case the body shall be opened and every cavity inspected, "even where the cause of death is *quite obvious*."<sup>5</sup>

If such a thorough examination of every region and cavity of the body is necessary in every case, how much more clearly so is it where there are several injuries apparent on the body, and the question to be decided is, whether this or that was the cause of death! And yet, in just such a case, Dr. Thompson has neglected this "indispensable" means of solving the question, and has contented himself with a mere external inspection of the body,—or rather a part of the body, for he did not even strip the clothing from the whole of it! Many cases might be stated to show the importance of such a thorough examination of the body, and how easy it is to mistake the apparent cause of death for the real one. Mr. Taylor (p. 282), states a case in which a man was stabbed by his wife in a quarrel, and died in ten minutes. He received two stabs in the right arm, and one in the region of the stomach. Everybody, even the prisoner herself, believed that the man had died from the wounds; but the medical evidence, on the trial, showed clearly that death had resulted from the rupture of a large aneurism, and the woman was acquitted. On page 278, he states another case, in which a man attempted suicide by cutting his throat. The wound was four inches deep, and involved some of the branches of a large artery. Three weeks afterwards the man dies, and the medical evidence, before the inquest, proved that it was the result of an abscess in the

<sup>5</sup> Guy, p. 369. 2 Beck 5. Watson on Homicide 352. Taylor on Evidence 279. Ryan, 183.

brain. Mr. Taylor makes this case the subject of these pertinent remarks:

"If we suppose that the wound in this case had been inflicted by another, on provocation, and that the examination of the body had fallen under the hands of a less careful practitioner, who might have neglected to examine the head, the accused party would have been charged with manslaughter, and sent to trial. Here, again, the same witnesses being examined, and the prisoner's case remaining undefended, the evidence might have appeared sufficient to justify a conviction."

A ball will often strike the body and run around under the skin, appearing to penetrate right across the cavity. Thus, in one case, a man appeared to have been shot fairly across the chest, and through the lungs; when it was found, upon inspection, that the ball had run around the lungs; without traversing any part of them. (Hennen's Military Surgery, p. 368.)

I might multiply such cases, but these are enough for my purpose. They show how apt we are to mistake an apparent cause of death for the real one; how important it is to resort to every possible means of finding out the truth; how dangerous it is to form an opinion without it. What proof have we here, that either of the apparent causes of death was the real one? What proof that the gun-shot wounds, rather than the other injury, were the cause of death? Had the witness opened and explored the body, he might have ascertained the truth; I have shown you that in no other way could it be done; and yet, without this examination, which might so easily have been made—without this evidence, so easily had, and so conclusive had it been consulted—you are called upon to adopt one of two apparent causes of death as the real one, and to hang the prisoner upon this opinion of the doctor!

But I go further, and with all my respect for Dr. Thompson as a gentleman and as a practical physician, which I here avow once for all, I undertake to show that he is ignorant of the subject on which he testifies, and that it would be monstrous cruelty to hang a dog upon his opinion. What are his opinions worth? Would any man with a competent knowledge of the subject, have ventured an opinion with such im-

perfect materials? He told you that an internal examination of the body is not enjoined by the books, if the surgeon is satisfied without it: I have shown you that the books distinctly and uniformly enjoin it in every case, and declare that in no case can an opinion worth trusting be formed without it. He told you that the process of putrefaction is not more rapid in and about the wounded parts, than in other parts of the body. Yet medical writers distinctly and uniformly say the contrary. (Guy, p. 385, O. 387, 2 Beck. 33.) He told you that, in his opinion, the direction of a ball in passing through the body could not be changed, or could hardly be changed, unless it should strike a bone, or a tough cartilage like that of the windpipe. But Mr. Taylor (333) says:

“These deflections of projectiles may occur, not merely where they come in contact with bone, but when they meet skin, muscles, tendons, and fasciae, the ball then takes its course in the intestines, between these different structures.” “When a ball traverses the body, it sometimes happens that the apertures are opposite to each other; although it may not have taken a rectilinear course between them, but have been variously deflected by the subjacent soft parts. This deflection of a ball from a rectilinear course, is especially met with in those cases where it happens to strike obliquely a curved surface.” P. 332.

He told you, moreover, in positive terms, and made it the basis of an important deduction, that wounds of the heart are more certainly and rapidly fatal, than wounds of the abdominal aorta. Yet Mr. Watson, in his work on Homicide (p. 97), quoting from a work on Military Surgery, tells us, that “wounds of the aorta and pulmonary artery, are more immediately and necessarily fatal than wounds of the heart itself.”

Dr. Smith, in this work on the Arteries (p. 92), states the same fact, in terms not less positive and distinct, and the testimony of every writer on the subject is to the same effect. Indeed, so far is it from being true, as Dr. Thompson supposes, that gun-shot wounds of the heart are necessarily and instantly fatal, that cases have often occurred, in which persons have survived shot wounds of the heart for many days, and sometimes even for years. In one case, a boy who was shot in the heart with a fowling piece, survived sixty-seven

days, and after death five shot were taken out of the cavities of the heart. And in another case, the patient not only survived a wound of the heart, but got well of it, and upon his death, six years afterwards, the ball was found imbedded in the heart.

It is not even shown that these gun-shot wounds may not have been inflicted after death. Not a single indication is mentioned to show that such was not the fact, and the entire absence of blood upon the body, which Dr. Thompson states, is a strong indication that the wounds were probably not inflicted during life. It is not for me to show why or by whom the dead body was thus brutally treated; it is not enough for the commonwealth to say that the supposition is an improbable one. Such things have happened; the only indication mentioned by the witness, as far as it goes, favors the supposition; and the burden lies upon the commonwealth to show that it cannot be true.

But suppose it to be true that these wounds were inflicted during life, and that they were the cause of death,—still, as I have shown you, there is no evidence, not the slightest, of more than one discharge of the gun. And the great question still remains, is it proved that the prisoner is the person who discharged the fatal shot, and that he did it in such manner that he is guilty of murder? Remember the great rule which I have mentioned so often already, and which you must not forget or overlook, that the evidence on the part of the commonwealth must be so clear, as to exclude every “possible hypothesis” but that the prisoner is guilty of the crime charged in the indictment.

Was there no other person who might have been the murderer of Muir,—no other person who might have known of his death and concealed it? Why might not Ross have been the murderer? He was absent from his work on the second and third of February. Where was he, and what was he about? I may be told that Ross had no motive to commit the murder. But I reply, that on that subject we have no information, and, moreover, that men oftentimes act apparently without mo-

tives, and even directly in opposition to those that are usually the strongest. It is not given to us to read the secrets of the human heart, or to trace the springs of human action; and while no man ought to be convicted, merely because he seems to have had strong motives to commit the act with which he is charged, so, on the other hand, no man should be assumed to be innocent simply because we are unable to find out a motive for the act. It must be borne in mind, too, that the prisoner has been suspected of this crime and charged with it, while Ross has not been, and that you may, therefore, be in a state of mind to attribute undue weight to what you may suppose to have operated as motives with the prisoner, and less able, for the same reason, to detect the motives that may have actuated Ross. The attorney for the commonwealth has spoken of the motives which the prisoner had to murder the deceased,—to escape the payment of a debt. And was that a motive to commit a murder—to murder his friend—a visitor to his house! And that, too, when, as the deed shows you, the property bound for debt was not his—when the payment or cancellation of the debt could only relieve him of a little importunity! The prisoner had been importuned before, and again and again, for the same debt. Vaughan, while Deputy Sheriff, had pursued him with executions—he had long known all the vicissitudes of poverty—the splendid indulgences of former wealth had been taken from him in early life for the payment of his debts—and yet it is gravely said, that to such a man,—a man in the highest grade of society—a man of intelligence and education, and high personal character, now in the wane of life, and the father of a family, it was a sufficient motive for murder, that he would thereby escape the importunity of a creditor!

In point of fact, the motive is so entirely inadequate, the crime charged against the prisoner is so improbable, unnatural, and unreasonable, that you ought to look with suspicion upon every circumstance that seems to convict him, and to consider with ten-fold vigilance and care whether some other explanation may not be true.



I repeat the question, why may not Muir have been killed by accident in hunting, an occurrence by no means uncommon? Or why may not the dispute which existed at the house in the morning, as proved by Dr. Hurt, have been renewed in the woods, and Muir killed by Eppes, in a quarrel or even in self-defense? Is there anything unnatural, unreasonable, or improbable in either of these suppositions? Why, then, may not the prisoner, in some one of these ways, be innocent of the murder? If it may possibly be so, if the facts of the case are not absolutely inconsistent and irreconcilable with it, then the prisoner cannot be found guilty. He may have been guilty of the basest conduct, he may have committed every crime in the calendar, but you are sitting here, not in a court of conscience to pass upon his morals, but in a court of law, to try him for the crime of murder, and for that only.

The prisoner, finding that Muir was dead, may have conceived the desperate purpose of getting possession of the bonds to avoid payment of the debt; and if such may have been the fact, every subsequent occurrence, and every subsequent act and declaration of the prisoner, is natural, consistent, and easily explained. Let us see.

First came the letters of which you have heard so much. The first letter is easily explained. In order to get the release which the prisoner was aiming at, it was necessary to do two things; to satisfy John Muir that the money was paid, and to account to him for the absence of Adolphus. The scheme of fraud could not otherwise be accomplished. This letter, then, which stated the payment of the money, and gave a reason for the absence of Adolphus, was absolutely indispensable to the end which the prisoner had in view.

The other letters followed naturally, and of necessity, as part of the same plan. The prisoner had undertaken to account for the deceased, not because he had murdered him, but because it was necessary to carry out his fraudulent purpose, and he had the same motives, on this supposition, for writing the subsequent letters, that he would have had in case he had been guilty of the murder. A single letter would have aroused

suspicion ; the second letter seemed to prevent it, and the continued pain in the wrist accounted for the handwriting. But the wrist would get well, and he could preserve the same artifice no longer ; and to cut off inquiry, and to explain forever the final disappearance of the deceased, the prisoner drowned him in the waters of the Mississippi.

You may say that these letters are the device of a guilty conscience perpetually goading the prisoner. I admit it. But guilty of what ? If nothing but the guilt of murder will explain them, then they must weight against the prisoner ; but if any other supposition can account for them, if the prisoner might have had another motive for writing them, if there is any other "possible hypothesis" that may account for them, they deserve no weight, absolutely none on the trial of this indictment.

Then, as to the watch. Is it possible that the possession of this watch by the prisoner on the twenty-second of May, is entitled to the immense weight ascribed to it by the attorney for the commonwealth ? The watch may have been purchased of Muir, or it may have been stolen from his dead body, as I have said of the bonds. Could the prisoner be convicted of larceny upon this evidence ? Is a man who is found in possession of a watch which a year ago or a month ago belonged to another, who has since died, to be held guilty of theft because he cannot prove how he came by it ? Why, the law of the land, and the common sense of any man, agree that such a conclusion would be monstrous, because, for anything that can now be known, the dead man may have given or sold it to him.

The truth is, that there is nothing in this circumstance that is not consistent, entirely consistent, with the prisoner's innocence of any crime whatever.

Upon the view which I am presenting to you, the facts to which Mr. Gill and Dr. Hurt testify, and which are regarded as so strong, are easily explained. The prisoner had stolen the bonds,—had forged a receipt upon one of them,—had falsely represented that he had paid them,—and had procured a re-

bind the prisoner should fall off, and he, as free as air, strut forth the dignified and haughty William Dandrige Epes—the bleeding hearts of wife and children should again leap for joy, and peace and happiness reign in that family circle, where mourning and bitterness have taken up their abode, and Francis Adolphus Muir, whose bones lie moldering in the cold grave, should be still moving among us, attracting the admiration of all by his manly form, his urbane deportment, and high bearing; and binding, closer and closer to him, every day, by the tender cords of a disinterested friendship, relations and friends, who now bear melancholy testimony to his virtues. And those relations and friends, whose wounds are deep and lasting, and whose loss is irreparable, should forget that they had ever felt a pang. But we are all feeble mortals—too frequently not able to prevent, much less repair, injuries. We must, therefore, deal with men and their crimes as we find them.

Everything animate clings with instinctive tenacity to life. So universal is this feeling, that all men acknowledge the truth of Scripture which declares Death “the king of terrors.” Society is made of individuals; and as individuals cling to life and shrink from death, it is natural that society—law—should throw around the lives and liberties of individuals every possible safeguard and protection. So tender is this regard for life and liberty, that no man, no matter how low, no matter how base, can be deprived of either, unless he has offended against the laws of society; and before it can be adjudged that he has so offended, he must be regularly accused, and every rational doubt of his guilt removed. The prisoner, therefore, as his counsel have argued, cannot be punished, if there be a rational doubt of his guilt.

But, gentlemen, the wicked and unruly passions of men, if let loose, unbridled and unrestrained upon society, would delight in scenes of blood and death. Hence the tender regard which society—law—extends to life and liberty, is not confined to those accused of crime, but the value of every man’s life is recognized; and when one man deliberately takes

the life of another, except to save his own, society—law—declares that for such offense, he shall forfeit his own life—  
“He that sheddeth man’s blood, by man shall his blood be shed.”

The counsel for the prisoner have over and over again, in language the most solemn, and manner the most earnest, warned you against the influence of public excitement—public prejudice. They have pointed you to the evidences of that excitement, and that prejudice, in the multitude who have anxiously thronged this house during the entire progress of this trial. They have told you, that the whole world was against the prisoner, and that to you, a jury of his country, alone could he look for protection. They have reminded you of your oaths, of all the solemn responsibilities they impose, and then commanded you to shut your eyes, stop your ears, and steel your hearts against all these influences.

Gentlemen, if I know my own heart, I have desired that the prisoner should have a full and fair trial. I have desired, that he should have the benefit of able counsel—that nothing should be withheld, which, by possibility, could be of service to him, and that nothing should be used against him, which it was not manifestly right and proper should be used. My friend, Mr. May, and myself, determined to prosecute in a spirit of liberality—to take not a step, to employ not an argument, which our duty did not plainly suggest; and we now charge you, look to the law and the evidence! The life of the prisoner is in your hands—let not public prejudice and excitement, the result of a thousand rumors, alone take it from him. No! hold the scales of justice with a steady and even hand—look neither to the right nor left—but hear patiently, examine fairly, and decide justly.

There has been and there still is excitement. Yes, the murder of Francis Adolphus Muir did create excitement; if it had not done so, our people would have had no hearts, no souls. A noble young man had been inhumanly murdered and secretly buried. The suspicions of his friends and relations had been lulled for months, when all at once the astonishing

discovery was made—the murderer fled—the grave was found and the body disinterred. Excitement! Indignation! What generous soul did not feel them? When such spectacles shall cease to produce sensation—when the people shall stand by, and look unmoved on such cruel, foul murders—then will virtue and humanity have fled, and every man himself become fit for murder.

But ours are a law-loving and law-abiding people. There is no man here present, certainly no man upon that panel, who desires the life of the prisoner, unless he be guilty. Gentlemen, if the prisoner be not guilty touch not a hair of his head. If there be a rational doubt of his guilt, give him the full benefit of that doubt. Our laws, in their benignity and mercy, seek not innocent blood. But if he be guilty, if the evidence has removed from your minds all rational doubt, then in the name of the Commonwealth of Virginia, I charge you strike! Vindicate the majesty of your violated laws, and while the shield of protection is thrown around the innocent, let the verdict of an honest jury be a terror to evil doers! If you, lightly, upon vague and insufficient grounds, pronounce the dreadful sentence of “guilty” upon this man, then may his blood rest upon your heads—then are you perjured men. But if his guilt has been clearly established, and you hesitate or fail to pronounce that sentence, you trifle with your oaths, and are yourselves guilty, before God and man.

The prisoner has had able counsel. All that ingenuity, research, learning, and eloquence could do, has been done. No argument has been left unemployed—every nerve has been exerted—Logic, Romance, and Scripture, have all been invoked. If the prisoner is not acquitted, all who have witnessed this trial will agree that it is not the fault of counsel. One of the counsel declared that the prisoner had not a friend in the wide world. You, gentlemen, can bear witness, that in this he was mistaken, for he has found in his counsel, who were before strangers to him, two friends, strong and powerful. Had he been surrounded by a cordon of friends, more could not have been done in his behalf.

It is proper that I should, before proceeding farther, show to the jury, what the law means by a rational doubt; for the counsel, in their zeal, have extended the doctrine far beyond its true limits. According to their argument, jurors, instead of being influenced by the rational doubt contemplated by the law, would be authorized to tax their ingenuities to find out some "light, trivial, and fanciful supposition" or "remote conjecture" upon which to acquit. "The legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury." A great writer on the subject, Starkie on Evidence, says: "What circumstance will amount to proof can never be matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute, metaphysical, and demonstrative certainty, is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt; even direct and positive testimony does not afford grounds of belief of a higher and superior nature. To acquit upon light, trivial, and fanciful suppositions and remote conjectures, is a virtual violation of the juror's oath, and an offense of great magnitude against the interest of society, directly tending to the disregard of the obligation of a judicial oath, the hindrance and disparagement of justice, and the encouragement of malefactors. On the other hand, a juror ought not to condemn, unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest; and in no case, as it seems, ought the force of circumstantial evidence, where it is adequate to conviction, to be inferior to that which is derived from the testimony of a single witness, the lowest degree of direct evidence."

Here is the law—it is plain, and easily understood. If there is a reasonable doubt on your mind, as to the guilt of the accused, you ought not to condemn; but if you acquit on mere "supposition," "remote suggestions," it is a virtual violation

of your oaths, and an "offense of great magnitude," etc. It is by the "legal test" I ask you to try this case—by your reason, and your conscience—and I am sure you are willing to try it by this test.

The concise and able argument of my friend, who opened this cause on the part of the commonwealth, has relieved me from the necessity of a detailed review of the evidence; and I shall therefore refer to the evidence only as it may be necessary in the course of my reply to the arguments of the counsel for the defense. If I have comprehended those arguments, they may all be considered under five heads.

1. It has not been proved with sufficient clearness, that the body found was the body of Francis Adolphus Muir.

2. If the body of Francis Adolphus Muir, then it is not proved that he came to his death by gun-shot wounds as charged in the indictment.

3. Admitting it to be the body of Francis Adolphus Muir, and that he came to his death by gun-shot wounds, the negro man Ross may have murdered him.

4. Admit Ross did not murder him, but that he was murdered by the prisoner, the killing might have been accidental, or in self-defense.

5. The confession to Benjamin J. Vaughan is not to be relied on.

Every argument, used by either of the counsel, has had for its object the establishment of one or the other of these positions.

1. Is there a man upon that jury who entertains any doubt that the body found was that of Francis Adolphus Muir? I might ask, is there a man who conjectures that it was not his body? The argument of my friend, Mr. Rives, was an able one to establish the general proposition that men are easily and frequently mistaken, but certainly had no bearing on this case; and his Scriptural allusions I regard as rather unfortunate. We were referred to the history of Joseph and his



brethren, and reminded that Joseph's brethren did not recognize him, when they went into Egypt. Was it remarkable they did not? They had sold him when a lad seventeen years old to the Ishmaelites—he had been accustomed to act as a herdsman, and in harvest time to bind up sheaves. Near twenty years had passed, and they supposed him still in slavery. The dearth drives them into Egypt to buy corn, and they approach the presence of the "Lord of Egypt"—he is clad in robes of office, while they bow their faces to the earth. Had they raised their eyes, and in looking upon this august man, fancied they saw a resemblance to the lad they had sold into slavery, they would never have dreamed it was their brother. But Joseph knew his brethren. So with the case of the doubting apostle. The gentleman turned from the Old to the New Testament; and here, too, his allusion was not more fortunate—Thomas lacked faith—he had not seen the Savior—doubted his resurrection, and was afterwards rebuked. "Thomas, because thou hast seen me, thou hast believed; blessed are they that have not seen, and yet have believed."

Next came "remarkable cases," and you were entertained for some time with Morgan's case, etc. At this late hour of the evening I have not time to point out to you how entirely unlike this case are all those cited by my friend—they do not approximate this in the weight and character of evidence, yet they strikingly illustrate the frailty of human judgment, and establish but too clearly, that "absolute, metaphysical, and demonstrative certainty," is not attainable. If the identity of the body is not established in this, "no reliance can be placed on human testimony." It was in a remarkable state of preservation when disinterred—the weather was cold when it was buried, and thick woolen clothes on the body, and a silk handkerchief over the face, closely pressed by the earth, were well calculated to preserve it. Peter Boisseau, his brother-in-law, John, A. Muir, his brother, Dr. Thompson, Benjamin J. Vaughan, and Marcus J. Gaines, his friends, all testify positively to the identity. They tell you, they knew the body to be that of Francis Adolphus Muir, because the features, the

form, the hair, the teeth—everything was Francis Adolphus Muir's—and besides there were found on his person the gold button and the hair brush known to be his. In the strong language of Peter Boisseau, he knew it to be the body of Francis Adolphus Muir, just as well as he knew my friend, the prosecutor for the commonwealth, to be David May—while Mr. Gaines declared, he would have recognized it as the body of Francis Adolphus Muir, if he had unexpectedly met the corpse in the road. How much farther can human testimony go? The witnesses speak positively—they express not a doubt—every circumstance corroborates—not a suspicion that they are mistaken is excited. Yet you are to follow the suggestions of the prisoner's counsel—be led astray by the array of "remarkable cases," which their industry has enabled them to collect from the musty records of ages, and disregard the direct and unequivocal testimony of witnesses of the highest character. Nothing short of divine revelation—of celestial light—must satisfy the understanding—the conscience. Francis Adolphus Muir is missing—he was last seen with the prisoner—a body is found—his brother and friends swear it is his body—no other human being missing—yet, this is not enough. It is possible, some unknown person has been murdered and buried on Epes's land—it is possible, that person was very much like Francis Adolphus Muir—it is possible, his own brother and friends did not know, could not recognize his body. Gentlemen, I know several members of your panel—I have seen you on several occasions—I know your features, your persons—I would testify to your identity—yet, according to the arguments of the prisoner's counsel, it is not at all certain I should be testifying correctly; for you may be some other persons than yourselves. And when this painful trial shall be ended, and we shall return to our homes, and our children gather around our knees, though we may believe them our identical "little ones," yet it will be by no means certain, that we are not deceived. Nay, gentlemen, could I consent to the propositions and heed the arguments of the counsel, I should very soon doubt my own identity.

2. It is not proved, that Francis Adolphus Muir came to his death by gun-shot wounds, as charged in the indictment. Now, while I listened with great pleasure to the accurate and extensive learning displayed by my friend, Mr. Joynes, on this medico-legal subject, he must pardon me if I decline to follow him. Indeed, I shall not controvert his positions, for they are sustained by the best authorities, French, English, and American. It is true, that the witness, Dr. Thompson, well known in this community as a sound, practical physician, and my friend, who on this occasion has shown that he deserves to be styled Doctor, differ on some mooted questions, and when the doctors disagree, I shall not presume to decide. But it occurred to me, gentlemen, while my friend, all fresh from his books, was propounding question after question, on a most difficult and abstruse subject, and thus somewhat embarrassing the witness, that if he and I were now subjected to such a rigid and scathing examination on my Lord Coke, we might occasionally reply in the court language, "*curia advisare vult.*"

But suppose the counsel right and the witness wrong—admit Dr. Thompson is mistaken in some of his answers to the many questions propounded to him, does it therefore follow that his evidence is not to be regarded? He examined the body, and testified that Muir came to his death by wounds inflicted on the back and breast—he probed the wounds, and is clear and positive. But this does not satisfy the counsel. The books lay down certain rules by which the surgeon should be governed—the wounds should be carefully traced, the track of the ball or shot pointed out as on a piece of paper. This, as a matter of curiosity, is all very well, and may be considered by the learned surgeon as of great importance, but certainly it is of little consequence in a case like this. When Francis Adolphus Muir disappeared he was in perfect health—when his body was found and disinterred, there were no evidences of disease, but marks of violence. In the back you find his clothes and body pierced in several places—in front, a fearful wound going directly in the region of the heart. You are

told that the wounds in the back were made with large shot, that in front, with a ball. But the counsel for the prisoner argues this will not do. Why? Because the physician did not understand his business, and balls, shot, etc., take irregular directions. Besides, the physician has not made such an examination as will enable him to tell whether the body was shot before or after death. Now, is not all this very much like the “fanciful suppositions” and “remote conjectures” which the law declares you are not to regard? Two men are seen to engage in mortal combat, you hear the report of the pistol, and see one fall a corpse. Upon examination, you discover that a ball has entered the body. Would you not conclude the man had come to his death by shooting? Yet you ought not, according to the argument of the counsel, to be satisfied of the fact, until the course of the ball has been traced, because that may have glanced, and the man in falling, have broken his neck. This surely is not the argument of the opposite counsel, but it seems to me to be the necessary result of it.

But, gentlemen, I am aware of no law—no reasons which make physicians and surgeons alone competent to prove that death has resulted from gun-shot wounds; and while I have the utmost respect for Dr. Thomposon, and place the greatest confidence in his evidence, I must say, that I consider the evidence of Marcus J. Gaines on this subject entitled to just as much weight as his. Mr. Gaines is a gentleman of capacity and character—he was present at the examination of the body, and has testified that, in his opinion, it was shot both in the back and breast—judging from the orifices, in the back with shot, and in the breast with a ball—and to the same effect is the evidence of other witnesses. You may then strike out every word uttered by Dr. Thompson, and this charge in the indictment is fully and fairly made out by clear and satisfactory testimony.

I have thus, in a condensed form, disposed of the two first propositions. If I have spoken of them as “fanciful” and “trivial” it is not because of a disposition to treat the argu-

ments of the counsel with disrespect—on the contrary, I commend the zeal which has led them to employ in this case every conceivable argument.

3. Admitting it to be the body of Francis Adolphus Muir, and that he came to his death by gun-shot wounds, the negro man Ross may have murdered him. This cannot be so—the evidence proves that it is not so. Mr. Harrison testified, that he was engaged the last week in January and first week in February in burning plant beds on a certain branch; that he had finished one side, and had moved over on the other side, when, early in the second week, Ross left the plant bed, and was gone a day or two—that he was at the plant bed when he (the witness) went to his dinner, but had left when he returned. The first day of the first week in February was Sunday—Monday was the second day of February—Ross could not therefore have left the plant bed earlier than after dinner time on Monday, the second. I shall not stop here to sustain Mr. Harrison's testimony. The clearness and impartiality with which it was given in—the accuracy of his memory, and the facts and circumstances to which he referred, as well as the rigid cross-examination to which he was subjected, all demonstrated that he was entitled to full confidence. The prisoner and Muir left the prisoner's house together early in the day of Monday, the second of February, and went in the direction of the spot where the body was afterwards found. Now, where were the prisoner and poor Muir from that time until the dinner hour? Before twelve o'clock of that day, Francis Adolphus Muir was as surely numbered with the dead as that we are here! Where had he been from the time they left the house? Did Epes decoy him in the woods, and then confine him until Ross could be sent for to murder him? John A. Muir lived within a mile or two—Mr. Baily and others close by, yet no one saw or heard him; and the grave was only a half mile from the house. I repeat, where were they from the time they left the house until dinner time? The facts proved, therefore, show that Ross could not have been the murderer, unless it can be believed, that the prisoner had

in some way detained or confined the deceased for several hours.

But is this argumnt, this proposition, reasonable? We are informed that the poor slave is dead, yet let us do justice to his memory. What earthly motive could he have had to murder this young man? Did he want the bonds?—the gold watch? If Ross murdered him, how came Epes by the bonds and watch? Why did Epes write these letters? Why did he run away? Why did he not tell Benjamin J. Vaughan so, when he was conversing on the subject? He is represented to be a sensible man, yet he never whispered such a thing. If it had been true, his own safety—life—would have led him to declare it. But, it may be asked, if Ross did not murder him, how did he know where the grave was? Gentlemen, the prisoner had energy, purpose enough, to kill the body, but not industry enough to bury it—he made a confidant of his servant, and imposed upon him the labor of digging the grave. The prisoner committed many errors in his plan, but this was the greatest of them all. When he parted with his secret, he parted with his freedom—his life. It is true, Ross continued nominally the slave of the prisoner, but he was in fact his master, from the very moment he confided this horrid deed to him. You recollect, it was proved, that shortly after the disappearance of Muir, Ross disobeyed his overseer, who was about to correct him, when he ran to his master for protection, who returned with him, and interposed in such a manner as to make the chastisement a mere farce, and at the same time informed Mr. Harrison, the overseer, that he had determined to take Ross for a body servant. Why was this? Gentlemen, the prisoner was a slave! His life was at the mercy of the black man! And though his nerves were strong, though he feared not his fellows, though he feared not “death, hell, nor the devil,” yet whenever he looked upon Ross, his heart quailed within him! A nod of the head—a pointing of the finger towards the pine forest, would produce a submission, a servility from the master to the slave more absolute and cringing than ever slave rendered to master. He knew, he

felt that Ross could, at any time, consign him to infamy and the gallows—that the issues of life and death were in his hands. What an awful situation! A memory haunted by recollections of one of the most unfeeling and cold-blooded crimes ever committed—a conscience burdened with the deepest and blackest guilt, and with these a constant apprehension—“a fearful looking for of judgment.” I doubt very much whether the prisoner is this day suffering greater anguish, than when he and Ross alone, of all living men, knew that Francis Adolphus Muir was murdered and in his grave. True, all was hid from the world, and he moved in gay circles—was fond of music—engaged in scenes of hilarity and mirth—seemed cheerful. But the “still small voice” did not always slumber or sleep—the heavings and lashings of a guilty conscience were “more terrible than an army with banners.” By day and by night did the ghost of the murdered Muir haunt him, and he felt, even in this world, some of the gnawings of that “worm that dies not,” and some of the “burning of that fire that is not quenched.” “The way of the transgressor is hard.”

4. If the prisoner did kill Muir, it may have been in self-defense, or accidental.

What proof, what circumstance have been introduced to induce even a probability, that the prisoner killed the deceased by accident or in self-defense? On the contrary, does not the evidence in the case negative any such “remote conjecture”? The prisoner was armed, the deceased not. Is it reasonable to suppose that an armed man was driven to the necessity of killing one unarmed, in order to save his own life? But it may have been accidental. If so, the prisoner must prove it. But no fact, no circumstance is relied on for this purpose. The prisoner may have killed the deceased by accident—that is all. Is not this irrational, fanciful? We are told, the prisoner and the deceased were on good terms—were friendly. Suppose the prisoner had by accident killed his neighbor and friend, what would have been his feelings, his conduct? Overwhelmed, he would have rushed to the brother



of that friend, and shown by his tears, by his deep emotions, the anguish of an afflicted and suffering heart—he would have carried him to the melancholy spot, have pointed out the manner and cause of the catastrophe, and together they would have mingled their sorrows over the prostrate form of friend and brother. Yes, his soul would have been bowed down, and his unhappy countenance have testified the truth of his tale. Not so with the prisoner—he killed his friend by accident, and yet before the tears had time to dry upon his cheeks, he robbed his dead body.

There was no accident, no killing in self-defense, but the prisoner, William Dandridge Epes, deliberately, and “of his malice aforethought,” killed and murdered Francis Adolphus Muir.

It is not denied that men have been executed, who were afterwards ascertained to have been innocent—but no case has been cited—no case can be adduced, attended by an array of facts and circumstances such as exist in the present case, in which it afterwards turned out the prisoner was not guilty. If you can acquit in this case—if you ought to acquit, then I solemnly declare no man’s life is safe. If you acquit in this case, then can you convict in no case whatever, in which a witness is not produced who will swear that he saw the killing. All that will be necessary hereafter when the wicked man has determined upon death, will be for him to decoy his victim out of human sight, or waylay and murder him. For never can a case occur, in which a greater multitude of facts and circumstances will concur in pointing out the murderer. I would sooner disbelieve any two men who walk on the face of the earth, than I would discredit all the facts and circumstances proved in this case. The prisoner had the motive for and the means and opportunity of perpetrating the offense, and he used the precaution to avert suspicion and inquiry.

It is proved, that the last time the deceased was seen, he was in company with the prisoner—that was on the morning of the second of February, 1846. It is proved that he went to see the prisoner to collect money from him. No mortal eye beheld

the deceased after this, until his mangled body was disinterred on the fifteenth of July, 1846. If Francis Adolphus Muir was not murdered while in company with the prisoner, where was he from the second of February to the fifteenth of July? Did he go to any other spot? Did he put foot on any other soil? If so, was he invisible? Could no human being behold him? Was he killed on the road to Petersburg and brought back and buried on the prisoner's land? Or was he drowned in New Orleans, and by some mysterious and supernatural hand taken from his watery grave and brought back to Virginia, that his mortal remains might find an inhospitable grave on the "Old Homestead"? Yet the prisoner in his letters (for the three letters introduced are all proved to be in his handwriting) tells you he was in Petersburg and New Orleans. If the deceased was in Petersburg on the fourth of February, the date of the first letter, where is the witness who saw him? That letter informs us, that he had got a friend to write it. Where is the friend? Gentlemen, no friend penned that letter, unless the murderer is entitled to call himself the friend of the murdered.

But one letter does not complete the plan. The deceased had promised his brother to return to his house on the evening of the second. The letter of the fourth gives the reason why he had not done so, and further informs him that Captain Epes had paid every dollar due, etc., and that he was going to New York. He must, therefore, be accounted for at New York. Hence the letter of the twelfth. And here, an overruling Providence permitted one of those mistakes, which distinguish truth from fiction. "You will find this letter mailed from Petersburg. I met with a gentleman on his way to that place, by whom I sent it, with a request," etc. He makes the writer say that he had met with an opportunity and had sent a letter, which he was at that time writing. The letter of the twelfth of February, informs his brother that he had gone to Missouri. For what? Why, he had heard that his relations were not getting on well—wanted money, and he had gone to relieve them. This letter, it will recollected, enclosed valu-

able papers belonging to Francis Adolphus Muir. But it is necessary other tidings should be received, and what comes next? The Junius P. Rollins letter. It brings melancholy news. A hat had been picked up floating down the Mississippi, underneath the lining of which was found, "F. A. Muir, Dinwiddie county, Va." He is dead—that is the meaning. And does this letter bring any words of consolation? Are the suffering relations assured that the young man had died as he had lived—the soul of honor?

Nothing of this—nothing to soothe the suffering hearts of brothers and sisters. But with his death is brought the intelligence of his disgrace. He traveled under a fictitious name, and after reaching New Orleans had denied that he was Francis Adolphus Muir. Besides this, all the money he had received from William Dandridge Epes for his infant brothers and sisters, is gone. Gentlemen, was it not enough to murder the body of Francis Adolphus Muir? Did not his life satisfy the prisoner? Must that which is dearer than life—a fair name—be torn from him also? Must his relations not only mourn his death, but must they be deprived of the consolation which a recollection of the virtues of their noble kinsman would impart? Was it the purpose of the prisoner to murder both body and reputation? But what cared William Dandridge Epes for character? It did not enter his mind. He had determined to murder Francis Adolphus Muir in order to get the \$3,000 bonds, and he regarded nothing that stood in the way of this object.

We have proved that the deceased was last seen in the company of the prisoner—we have proved these three letters to have been written by the prisoner. One of the counsel asked you to read the "Wm. D. Epes" signed on the Jarratt register, and compare it with these letters. I tell you, if you do, gentlemen, you will find the "Wm. D. Epes" in the letter of the fourth of February, and that on the register, as identical, as if they were the impression of a copper plate. The witnesses who proved the letters to be in the handwriting of the prisoner, told you there was an effort to disguise, but a careful exami-

nation will convince any one competent to decide, that all these letters are written by the same hand—the prisoner could not lose the identity of his handwriting. A man may make the effort, but he may almost as soon change the features of his face—his own peculiarities will stick to him.

The prisoner was in Petersburg when the first letter was written; there when the second was mailed, and again when the third was mailed. The first letter was delivered by the prisoner himself to John A. Muir. If he did not write it, where is the man who did?

The commonwealth would not ask you to convict a man simply because he had rode off with an individual who was afterwards found dead. We do not ask you to convict the prisoner here on account of any one circumstance by itself, but we do, in view of all the circumstances of this case, ask you to convict.

But the fact that the deceased was last seen with the prisoner—that these forged letters were written by the prisoner—that they were sent from Petersburg when he was there—are but the beginning of the facts in this case. If William Dandridge Epes did not murder Francis Adolphus Muir, how does it happen, that on the twenty-sixth of May he traded off the watch, which it has been proved Muir had on when he left his brothers, on the morning of the second of February? How does it happen, that he had in his possession the bonds, and that there was a forged receipt on one of them? He alone has it in his power to explain these things. How came he by the watch? Where are the bonds? Why are they not introduced here? If he paid the bonds, he can show from whom he obtained the money to do so.

Again, on the ninth of July, the watch was found. This man, whose countenance has undergone no visible change during the progress of this trial—who could join in the search for the dead body—who could face an excited multitude without quailing—who could profanely exclaim, in the presence of those around, that he was not afraid of “hell, death, and the devil”—this man, on the discovery of the watch, takes to

his heels. Tell me, if William Dandridge Epes had not known he was guilty, would he have fled? Or, rather would he not have proclaimed and proved his innocence? What do the books say? Be not alarmed, gentlemen, I have no idea of entering upon the boundless sea of medico-legal learning, in which my friend has displayed so much ability.

*Mr. Joynes.* The gentleman will answer, and not ridicule, my arguments.

*Mr. Gholson.* I must decline. I do not intend to answer your arguments. Indeed, I am willing to admit, that in the controversy between Dr. Thompson and yourself, you got decidedly the better of the argument.

The books say:

"If on the supposition that a charge or claim is unfounded, the party against whom it is made had evidence within his reach, by which he may repel that which is offered to his prejudice, his omission to do so supplies a strong presumption that the charge or claim is well founded; it would be contrary to every principle of reason, and to all experience of human conduct, to form any other conclusion. The consideration, in criminal cases, frequently gives a conclusive character to circumstances which would otherwise be of an imperfect and inconclusive nature." (Starkie, vol. 1, p. 487.) And again. "Although a party may not be compellable to procure evidence against himself, yet if it be proved that he is in possession of a deed or other evidence, which, if produced, would decide a disputed point, his omission to produce it would warrant a strong presumption to his disadvantage." (Starkie 1, 487.)

But the bonds have not been introduced. We have not been informed how the prisoner came possessed of the watch. We have not learned the sources from which he procured the means of paying the bonds. If the prisoner be not guilty, he can furnish this information—he can produce the bonds. His life—his character—the peace and happiness of a distressed family would prompt him to do it. His omission to furnish the information, to produce the bonds, must therefore "warrant a strong presumption to his disadvantage."

You have been told that the prisoner having fled is no evidence of his guilt—that many men have fled who were innocent, etc. This is true. Weak, injudicious, timid men have

fled through fear—apprehension. But the prisoner is not one of that class. No, if ever a man breathed, who would look upon death and carnage unmoved, he is that man. Shall he receive the benefit of a principle which is extended to the weak and timid alone? He could go to Petersburg on the fourth of February, two days after the murder is charged to have been committed—he could attend the parties on the twenty-third and twenty-fifth of February—he could mingle with the crowd who came to search his land—he could pass within a few feet of the grave—he could do all this without quailing, and yet he runs away through timidity. No, gentlemen, it was the discovery of the watch that made him flee. He ran to save his life, for he saw, he felt, the evidences were thickening, and the law was about to lay hold on the guilty.

There are many circumstances to which I have not even alluded—the falsehoods told by the prisoner in his conversations with John A. Muir—his retaining the letter of the fourth for several days—his borrowing the buck-shot—his sending to the plant bed for Ross—the parts of the bridle found in the woods—the horse being found in the plantation of Mr. Bailey, and many other circumstances, which, taken by themselves, would appear trifles, yet, when connected with the other leading facts, form one unbroken and overwhelming chain of evidence, which no man in his senses can resist.

If you entertain a rational doubt as to the guilt of the prisoner, you must acquit. About what do you, can you doubt? Do you doubt that Francis Adolphus Muir was murdered? Do you doubt that it was his body that was found? Do you doubt that William Dandridge Epes murdered him, and that his motive was to get the bonds? Do you conjecture, even, that the murder was accidental or in self-defense? Then, I repeat, about what can you doubt? If you have carefully listened to the evidence, and still doubt, you would scarcely believe the prisoner guilty, if one were to rise from the dead and solemnly declare his guilt. Human testimony certainly would not satisfy you. There is no conflicting evidence—every fact, every circumstance proved in the case, points with unerring

certainty to the prisoner as the murderer of Francis Adolphus Muir.

But, gentlemen, we stop not here. If all that you have heard does not satisfy your conscience—there is yet another witness—one who knows the truth of this sad affair—a witness whose accuracy you cannot doubt—William Dandridge Epes himself has declared his guilt!

5. The prisoner's confessions are not to be relied on. And here permit me to say that I concur entirely with the opposite counsel—that as a general rule, the confessions of a prisoner should be received with "great distrust." Such confessions are usually made "in want of advisers, under circumstances of desertion by the world, in chains and degradation, with spirits sunk, fear predominant, hope of fluttering around, purpose and views momentarily changing, a thousand plans alternating, a soul tortured with anguish, and difficulties gathering into a multitude," etc. Hence a confession "obtained either by the flattery of hope, or by the impression of fear, however slightly the emotions may be implanted, is not admissible evidence." But when a prisoner makes a free and voluntary confession of guilt, it has ever been held strong evidence against him. Phillips on Evidence says, "Since an admission is evidence against a party in civil suits, with much stronger reason is the voluntary confession of a prisoner against him on a criminal prosecution: for it is not to be conceived, that a man would be induced to make a free voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the acts confessed were not true."

Did the prisoner make the confession to Vaughan through the "flattery of hope" or from "impression of fear"? On the contrary, was it not a free and voluntary confession? But the counsel have asked, if you could believe it possible that the prisoner had made, or intended to make, a confession of guilt, that he would put his own neck into the halter? Gentlemen, the prisoner knew that no confession he might make would put his neck into the halter—he knew that he had already done that. He considered his fate fixed—the letter—the



watch—the grave—the dead body—his flight—were so many witnesses ready to rise up and testify against him. He regarded “the game as up,” and had no inducement for further concealment.

The confession to Vaughan is entitled to entire credit. Epes commenced the conversation—it was voluntary on his part—it did not occur until the second day of their journey. The manner in which the conversation commenced is natural. The newspapers from one end of the land to the other, had published an account of the murder, and also other serious charges against the prisoner. “I see by the papers I am charged with the murder of my mother-in-law, of a hog-drover, and my own son. Of these things I am not guilty; but this is bad enough, God knows.” This, however, the counsel tell you, is no confession. What then is it? What does it mean? He declares his innocence of the murder of his mother-in-law, his son, and the hog-drover, but adds, “This is bad enough.” What was “this”? For what had Vaughan gone to Texas? For what was the prisoner then in chains? If Vaughan had gone to Texas to apprehend the murderer, then does “this is bad enough” necessarily mean “my guilt of this murder is bad enough.” If he did not intend it as a confession; if he was innocent of the crime for which he then was under arrest, why should he declare his innocence of three offenses, for none of which he had been apprehended, and yet say nothing of his innocence, not a word in extenuation of that for which he was to be tried? If Ross was the murderer—if the murder was accidental, or in self-defense, would he not have said so? But he relied on nothing of the kind, but declared “this is bad enough, God knows,” and sure enough God does know, it is bad enough!

But the confession stops not here. Mr. Vaughan carried the conversation further. The prisoner admitted he had promised to pay the bonds, but did not have the money—that he was in the search, and that some of those present must have gone within a few feet of the grave—that it was not discovered because it was filled up and covered with pine boards, in such

a manner as to make it resemble a hog's bed. Nay, more, when asked if the body had been discovered, what he would have done, he replied, "I suppose I should have had to have given myself up." Given himself up for what? For a crime which he had not committed? Take the evidence; examine it fairly—give it the most favorable construction which it can bear, and tell me, is it not a clear and unequivocal confession on the part of the prisoner, that he committed the murder?

The confession is in accordance with every fact and circumstance elicited on the trial. It is proved by an impartial and respectable witness—it is free from all legal objections—it was not extorted through fear—it was not induced through the flattery of hope—it was made by no timid, weak man—it was free and voluntary. If, therefore, you believe the prisoner himself, upon his head must the blood of Muir rest.

Who can doubt now? Behold a cloud of witnesses, in a long train of circumstances, which cannot lie, and which gather strength as they are multiplied. And if these do not satisfy you, turn to the prisoner, and hear him proclaim that he did the horrible deed; and if you can still doubt, there is nothing you would believe. You would doubt there is an earth on which we stand—that there is a heaven, whose blue canopy is spread over us—yes, you would doubt that we lived and moved.

How strange this scene! Who here could have believed Dandridge Epes would murder and rob? Who would have dreamed that any man could find it in his heart to make Adolphus Muir the victim? The prisoner was proud and exclusive, yet regarded by all as infinitely above a mean or low act. The deceased, so generous, so kind, as to disarm even malice itself. Yet the death of the one and the disgrace of the other have brought distress upon two of our oldest and most respectable families. And I am sure I speak the sentiment of this entire community, when I say the only feeling entertained towards these families is that of kindness and of sympathy.

Gentlemen, I have done. This prosecution is closed. Your duties now begin. The annals of crime do not furnish a case of more deliberate, cold-blooded, atrocious murder. There is

not one extenuating circumstance. The blood runs cold at the bare contemplation of the horrid reality.

On the morning of the twenty-third of February, 1846, William Dandridge Epes was the proprietor of Grampian Hills, in the County of Dinwiddie. Francis Adolphus Muir was a young man, in the morning of life; so unoffending, so amiable, so cheerful, that he bound to himself a large circle of devoted friends. The confidence of a tender father had made him his executor, and the prisoner had become his debtor. He was the friend of the prisoner—of his family. On that morning he visited the prisoner for the purpose of a settlement. He entered his hitherto hospitable mansion. A few moments and they were seen riding off together. How different their purposes, their feelings, their views. Young Muir, cheerful as the morning, sees life and beauty in every object around him. At peace with all the world, everything was bright and pleasing. Long life was before him and the future had no evil forebodings. But the prisoner was brooding over murder. He was in debt and unable to pay. He had determined to kill and murder the young man. They proceeded—they enter the dark, deep forest. They alight from their horses—fasten them, and start for the spot where the deer is to be found. The unsuspecting young man leads the way. It is a narrow winding path. They reach the spot. The deadly instrument is leveled—aim is taken—the trigger is touched, and then, the clear shrill report! Young Muir falls astounded, and in the agonies of death turns his eyes for the last time upon his friend, ready to exclaim in his parting words, “I know it is an accident,” when the loaded pistol is pointed at his heart and discharged! A single struggle, and all is hushed! Francis Adolphus Muir lies a bleeding corpse at his feet. The murderer looks around—no mortal eye beholds him, and with satanic smile he says, “All is well!” He thrusts his murderous hands into the dead man’s pocket, and robs his body of the bonds!! He is about to leave, when his eyes are caught by the glittering watch which had adorned the victim’s person—

he stops, and rifles that also from the body, and then returns to his home, and dines in peace.

And this man is to be acquitted. And for this murderer, mercy has been invoked. His guilt you cannot doubt. A train of circumstances, overwhelming, conclusive, point to him as the guilty man. His confessions confirm that which was before clear. If you acquit—if you heed the voice of mercy in such a case, go first and tear down your temples of justice—burn up your law books, and let murder stalk abroad in the land.

#### THE VERDICT AND SENTENCE.

The case was submitted to the *Jury*, which, after an absence of about fifteen minutes, returned with a verdict of *Guilty* of Murder in the First Degree.

*September 25.*

The *Prisoner* was brought into court, and being asked if he had anything to say for himself why judgment of court should not be passed upon him, answered in the negative.

JUDGE NASH. William Dandridge Epes: It has become my painful duty, to pronounce upon you that judgment, which the law has provided for the offense of which you have been found guilty. I cannot, however, perform this melancholy office, without endeavoring to impress upon you a deep sense of the wickedness of the crime of which you have been convicted. It is the highest crime known to the laws of the land; and one attended in its commission with more circumstances of aggravation, and surrounded by deeper shade of guilt, than has ever fallen under my observation. The amiable young man, whom you have murdered, was your friend. He regarded you as his. And he trusted and confided in you, even in opposition to the advice of his friends. In violation of this confidence, and all the obligations of friendship, and the rights of hospitality, you drew him into your power, and perpetrated upon his person a foul and wicked murder. The motive which seems to have prompted you to this horrid deed is scarcely less criminal than the murder itself; it was no less

than the crime of robbing him of the bonds which he held against you. This you did. But it has proved a barren acquisition; as you have since been compelled to pay them. Nor did your crime stop here. In order to cover up the foul deed, you resorted to stratagem and fraudulent devices, in order to create the belief that he had received the full amount of the money from you, and had ran off with it, in order to defraud his younger brothers and sisters.

This brief review of your offense is not made in the spirit of reproach, but with the hope that it may impress you deeply with a conviction of the justice of your sentence, and prompt you in the brief time you have yet to live, to make the only atonement in your power, by seeking a reconciliation with your God. In that way only can you hope for happiness hereafter, and give balm to the bleeding bosom of your family, whose respectability and whose virtues are acknowledged by all, and to whom a generous and enlightened community will always extend the hand of courtesy and friendship, uninfluenced by the misdeeds of the husband and the father.

The judgment of the Court is, that you be taken back to the jail from whence you came, and that you be there safely kept until the twenty-second day of next December, when, between the hours of ten o'clock in the forenoon and three in the afternoon, you shall be taken by the Sheriff of this county, and be hanged by the neck until you are dead,—and may the Lord have mercy on your soul.\*

\* On the same morning that the sentence was pronounced, the following correspondence passed between the Rev. Mr. Banister and the prisoner:

September 25, 1848.

**Mr. Epes,**—As a clergyman of the Episcopal church, I feel it to be my duty and privilege to tender you the advice and consolation which she, in obedience to the commands, and in imitation of the example of her Divine Head, the Lord Jesus Christ, is ever ready to administer to all those who are any ways afflicted or distressed in "mind, body, or estate." In thus addressing you, I would not be thought officious by offering services which you may neither appreciate nor desire. I am not unmindful of the natural repugnance of the human heart to matters of this nature; and I know how to respect that peculiar grief with which a "stranger inter-

After his conviction Epes made a confession, as follows:

On the second day of February, 1846, Francis Adolphus Muir ate dinner at my house. My wife was sick on that day. In the afternoon we went out together to shoot deer, but could find none where they were said to have been seen in the morning. We then rode over to another part of the plantation, where we got off our horses, and Muir went down in the pines, where he said deer used to range, for the purpose of seeing if he could not beat up some. He could find none. As he came back, and was going towards the horses, I shot him. He fell immediately, and the first thing he said afterwards, was to ask me if I thought he was in his right mind. I replied that I thought he was. He then commenced praying, at which he continued for a considerable time. He then requested me to give his watch to Peter Boisseau's wife; and the last words he said were, "Captain Epes, I hope to meet you in Heaven." I stayed by him for an hour and a half, but do not believe that he was dead when I left him. Some words passed between us before I shot him; but this was not the cause,—my sole object being to obtain possession of the bonds. I knew that if Muir pushed me for the money, my other creditors would press me and my family would be ruined. Sooner than such should be the result, I preferred destroying Adolphus Muir. I never thought of the murder until riding along with him that day. I took the watch, not so much for its value, but I didn't care to bury it. I carried it to the old graveyard in the grove, and placed it under the rocks, where it remained two or three months. None of my family ever had possession of the watch. At the time I traded with Lumsden, I thought he had seen the watch before; there was something in his countenance that indicated as much. When I got the other watch, Lumsden asked me meddleth not." Nothing but a sense of duty and a lively sympathy with your present sufferings, could induce me thus apparently to obtrude myself upon you in a capacity which, in this world, is but seldom appreciated. Should you be pleased to receive this offer in the spirit of kindness with which it is made, you may, sir, command me at any times that may suit your pleasure.

I am, most truly, your friend,

J. M. BANISTER.

To which the prisoner returned the following reply, written on the back of the sheet containing the foregoing:

My Dear Sir—At this time my mind is not prepared to enter into any conversation in relation to the very important matter alluded to. I receive your views in the spirit intended. Should I hereafter feel the want of your aid in that most important matter, I will inform you, and will be thankful for your very kind offer.

With respect,

W. D. EPES.

The advice of the clergy and the consolations of the church were extended to the prisoner, up to the moment of his execution.

to let him enter it, stating that if at any time I should lose it, his entering the number would assist me in recovering it. I then felt assured that the watch would betray me. I wrote all three of the letters. I sent one to the post-office by a negro belonging to the tavern, and handed the one marked "Way" in at the office myself. The discovery of the watch was not the cause of my flight, as has been supposed. My brother Richard wrote me on the Monday before I left, that Friend knew the man who had written that letter, and if I did write it, I had better leave. On Tuesday morning, the third of February, I went over to see if I could bury the body; but having just got out after a long spell of illness, found myself unable to do it. I carried Ross over in the afternoon, and I stood by until he had buried it. No one knew anything of the murder but myself. Ross was ignorant of it, as were all of my family, and I alone am the villain who did it all. It is one of the darkest deeds that was ever committed, and I feel ashamed of myself whenever I think of it. I have been accused of the murder of a hog-drover. I have had nothing to do with a hog-drover these twenty years, and it is about twelve years since I lived at "Valparaiso," where it is said I murdered this one. I have been charged with killing my mother-in-law; but it was to my interest that her life should be prolonged, as during her life I have very often received presents from her of a thousand dollars at a time. I did not kill my little boy, as I had no interest in his death. Ross had had chills, and if I gave him anything to drink, it was quinine, for the purpose of stopping them. The time was when I would have cut Ben. Vaughan's throat, and that of my brother Richard, too, but now I have no feelings of ill will against a living soul.<sup>7</sup>

<sup>7</sup> The first statement made by the prisoner, after his return from Texas, in relation to the killing of Mr. Muir, was:—That Muir and himself went out to hunt deer, but finding none, they were returning to the place where their horses were tied, when Muir commenced talking about a settlement of the bonds. Epes said that he had been unable to raise the money in the way he expected he would have done. Muir then said, if the bonds were not paid, he would be compelled to sell the plantation, as the deed of trust required. Epes remarked that if he was to do that, he would be no gentleman, to which Muir rejoined that Epes was a d—d liar. A quarrel ensued when Muir, picking up a grub (or stick), advanced upon Epes. Epes told Muir that he did not feel himself a match for him in a personal combat, because of previous sickness, but Muir continuing to advance, Epes shot him. That Muir fell, and he stayed by him a considerable time, talking. That on the next morning Epes went over to where the body was lying, when he accidentally discovered a piece of brown paper sticking in the breast pocket of Muir's overcoat. He took it, and found the bonds wrapped therein. "The Devil instigated him" to take the bonds and watch from the person of the deceased, instead of going before a magistrate, giving himself up, and stating the circumstances as here detailed, which he had before determined on.



## THE EXECUTION.

*December 22.*

At about twenty minutes to one o'clock to-day (Friday), the prisoner, accompanied by the Rev. Messrs, Hargrave and Withers, left the Petersburg jail. The prisoner was dressed in his grave clothes (all white), and, with the exception of paleness produced by confinement, looked remarkably well. His carriage was erect and his step firm. Arrived at the spot, the Rev. Mr. Withers addressed the multitude collected, closing with a prayer appropriate to the occasion. The prisoner then mounted the cart, and in a clear and audible voice, indicating no signs of emotion, made the following remarks:

"Gentlemen: It was not my object to have anything to say on the present occasion, but as it may do good I have determined to say something. I have been charged with many crimes. I have been charged with the murder of a hog-drover—I have been charged with the murder of my mother-in-law—I have been charged with the murder of my own son—and I have been charged with the murder of my own servant:—but, gentlemen, all these charges are false—all false. Would to God I could say as much of that other charge. But of that I am guilty. I murdered Francis Adolphus Muir. I murdered him. He fell by my hand. I have regretted the act ever since it was committed—it has been before my eyes ever since. I have the gratification to state that I believe he is in heaven, and I trust I may meet him there. In his dying moments he said he hoped to meet me there. I hope I shall meet him there, and I believe I will meet him there, for I trust in God's promises.

"Gentlemen, I have seen better days, and many of you know it. But when the tempter is aroused we know not what we may do. I hope that my fate may be a warning for you to shun my example. I leave this world at peace with all mankind. I feel that I am at peace with my God. I trust to meet you all in heaven."

The Rev. Mr. Withers then gave out the hymn commencing, "How firm a foundation, ye saints of the Lord," which was sung by the vast assembly. The benediction was pronounced, and farewells were spoken by the clergy, and many others collected around, to all of whom the criminal said good-bye. He then turned to the crowd, saying "Good-bye to you all, I hope to meet you all in heaven."

The Sheriff proceeded in the performance of the duties of

his office. While the preliminaries were arranging, the criminal displayed the same firmness that he had shown throughout the trial and at the pronunciation of the sentence. While the bandage was being tied over his eyes, he muttered, "Ashes to ashes, dust to dust."

And all things being ready, the cart moved, and immediately the soul of William Dandridge Epes was in the presence of its Creator and Judge.

He died with scarcely a struggle. After the expiration of an hour the body was cut down, when the neck was discovered to have broken. The body was laid in a coffin, furnished by the relatives of the deceased, and deposited in the jail of Dinwiddie, to be on the next day removed to the residence of his brother.

## THE TRIAL OF BERTHINA TUCKER FOR GRAND LARCENY, NEW YORK CITY, 1820.

### THE NARRATIVE.

Berthina Tucker, who was sometimes known as Bonkoven, the name of a man who boarded with her, was charged with stealing a piece of silk from a store in New York City. The evidence was very strong against her, and in addition to this, she made a confession to the magistrate. But notwithstanding this, a friendly jury acquitted her and she left the court in triumph.

### THE TRIAL.<sup>1</sup>

*In the Court of General Sessions, New York City, December, 1820.*

HON. CADWALLADER D. COLDEN,<sup>2</sup> *Mayor.*

SAMUEL TOOKER, }  
STEPHEN ALLEN, } *Aldermen.*

*December 15.*

The prisoner, Berthina Tucker, alias Berthina Bonkoven, had been indicted for grand larceny in stealing a piece of silk valued at \$45, the property of Ezekiel I. Moore and William S. Moore, on September 27, 1820. She had been arraigned and pleaded *Not Guilty*, and the trial postponed until to-day, she being allowed to go on bond.

*P. C. Van Wyck*, for the People.

*Mr. Price* and *Mr. Phoenix*,<sup>3</sup> for the Prisoner.

The *Prisoner* being brought into the court room and the Constable being about to place her in the dock where felons are customarily placed during their trial, the MAYOR intimated

<sup>1</sup> \**Bibliography.* New York City Hall Recorder, 1 Am. St. Tr. 61.

<sup>2</sup> See 1 Am. St. Tr. 4.

<sup>3</sup> *Id.*, 780.

to the counsel, that although for some time past the Court had seen fit to adopt and adhere to a general rule, that every one charged with a felony, without discrimination, should be placed in the box during trial, yet he was aware of the hardship of such a rule, as applied to every case. The reason of the rule was, that the safety of the prisoner during trial might be insured. The Court had long contemplated the adoption of some other rule, less rigorous and more consonant with the principles of humanity; and, at length, had determined, that all persons charged with a felony, and who were not bailed, should sit in one of the prisoner's boxes, during trial; while those who were out on bail, might have the privilege of sitting by and instructing counsel.

#### THE EVIDENCE.

*Ezekiel I. Moore.* On the twenty-seventh of September last I lost from my store a piece of silk, about sixty-four yards. I advertised it, and having ascertained that information had been given to the police, that some silk of that description had been sold by Mrs. Covert, the prisoner's sister, at 87 Division street, opposite to Mr. Pigott's, I procured a search warrant, and with some police officers, searched her house; and, in a part of the premises occupied by Mr. Persani, found seven yards; Mr. Pigott gave me information that there were fourteen yards in his house, all which silk was sold by Mrs. Covert; a Mrs. Gender, from John street, came up there and said that she had lost silk, and said that Mrs. Covert had taken it away. Mrs. Gender and I then went to the house of the prisoner, in Orange street, to look for Mrs. Covert, but did not find her, as she had gone to her house in Division street. I procured two police officers and

went with them there. Mrs. Gender, on looking at the pattern, said it was not her silk, and Mrs. Covert alleged that she got it from her sister, the prisoner. I then went with the officers to the prisoner's house, in Orange street, and received word from her children that she had gone into the country, and, at other times, different stories. She was found by me in a house next to that occupied by her. She was brought to the police office and Mrs. Covert being there, they mutually accused each other of selling the silk. Prisoner was examined by Justice Christian, and shortly afterwards I was told by that magistrate, who had conversed with the prisoner in confidence, that she would confess the matter to me, and having retired into a separate apartment in the police station with her, she began by imploring me to be easy with her if she confessed. I told her I would, as all I wanted was my silk. She then said that she had parents who had

taught her better, but the devil tempted her to steal it. I then went with her to a house in Chapel street, and got fifteen yards cut in two pieces which she acknowledged that she had sold, and offered to pay the persons to whom she had sold it. Through information derived from her I obtained the whole of my silk, divided into patterns for dresses, and sold by prisoner to different persons.

In her examination in the police, prisoner has passed by the name of Bonkoven, because Thomas Bonkoven boards with her.

*John Chatfield.* Am a clerk in the store of Messrs. Moore. About ten minutes before the piece of silk in the indictment was stolen, prisoner came into the store where I was alone and purchased a dress of silk which, without paying for, she left, and directed it should be sent to No. 100 Bayard street. About five minutes after she had gone I missed the piece of silk and when the young man belonging to the store came in I went with the dress in search of the place where she had directed it to be left, and no such number could be found.

*Mr. Phoenix* summed up the case on behalf of the prisoner, and was followed by *Mr. Price*, who in the course of his remarks to the jury, insisted that they could not convict the prisoner, because it had not been proved that the property laid in the indictment belonged to Ezekiel I. Moore and William S. Moore. It was also urged, that the confession made to the principal witness ought to be discarded, because it was made under the influence of a promise; and that, independent of that confession, there was not sufficient evidence to charge the prisoner with the possession of this silk.

*Mr. Van Wyck* offered to prove by the principal witness, that the silk was the property of Ezekiel I. Moore and William S. Moore.

*Mr. Price* objected to this evidence at this stage of the case, on the ground, that in a criminal case, and against mercy, such a defect in the testimony ought not to be supplied.

The MAYOR said, there was no positive rule applicable to this case, which would prevent the admission of this testimony. This matter resting in the sound discretion of the Court; and though there are many cases where the Court would not consent to open an examination at this stage of the case, yet where an omission to produce important evidence manifestly appeared to be the result of inadvertence and mistake, I would

not consent to its exclusion. There is no other rule applicable to a case of this description than this, that the Court, in their decisions, should endeavor to do substantial justice; and, in the opinion of the Court, it would not be doing substantial justice to prevent the District Attorney from asking Ezekiel I. Moore whose property this was. At the same time, the counsel for the prisoner are at liberty to produce counter testimony, and to sum up upon the additional testimony.

*Ezekiel I. Moore.* The silk belonged to me and my brother, William S. Moore, as partners.

The MAYOR (to the jury). Although a confession made under the influence of threats, or promises of favor, is not to be received, yet, if property be found by reason of such confession, and by the showing of the prisoner, that fact being independent of the confession, is good evidence. It is left to the jury, under all the circumstances of the case, to determine, whether the information given by the prisoner of the various places where the silk was found, and her offer to pay for the silk in Chapel street, did not afford a just ground to infer that she had the property in her possession. There is the strong circumstance of her having been to the store, and purchased a dress of silk about ten minutes before the piece was missed, and of her having directed the dress to be sent to a number in Bayard street, which could not be found. In the absence of all testimony, are we not bound to believe that she never lived there? And laying the confession made to Moore entirely out of the question, is there not sufficient testimony to show that she had possession of this property? If so, is she not, according to one of the plainest rules of evidence, bound to account for such possession? Has she done so?

The *Jury* returned a verdict of NOT GUILTY.

# THE TRIAL OF RICHARD LAWRENCE FOR SHOOTING AT PRESIDENT ANDREW JACK- SON, WASHINGTON, 1835.

## THE NARRATIVE

On January 30, 1835, President Andrew Jackson attended the funeral at the Capitol at Washington of Warren R. Davis, of South Carolina. As he came out through the rotunda, leaning on the arm of Secretary Woodbury and accompanied by Secretary Dickerson and Mr. Van Buren,<sup>1</sup> a man named Richard Lawrence fired two pistols at him successively; but neither of the bullets took effect. On his trial, he gave a number of inconsistent reasons for his act, and claimed that he was insane; and so the jury thought, as he was acquitted and remanded to custody as an insane person. But Jackson always declared that it was a political attack, that there was no insanity in the case, that there was a plot against him, and that Lawrence was a tool.<sup>1a</sup>

<sup>1</sup> VAN BUREN, Martin. (1782-1862.) Born Kinderhook, N. Y. Studied law in New York City and admitted to New York Bar 1803. Practiced at Kinderhook 1808-13. State Senator 1812-15. Attorney General 1815. United States Senator 1821-27. Governor of New York 1828. United States Secretary of State 1829. Vice-President United States 1833. President of United States 1837-41.

<sup>1a</sup> Sumner, "Andrew Jackson," 368. "The writer of this was present at the latter part of the scene, when the prisoner was brought into the rotunda, after being first knocked down (as is represented in our engraving). He was then surrounded by a large concourse of people, whose feelings were naturally much excited, so much so, indeed, that it was evident that many with difficulty restrained themselves from taking summary vengeance on him. One gentleman, who held Lawrence by the collar, was so zealous in keeping charge of him, that it was not until much persuasion had been used by the marshal, that he could be prevailed upon to deliver up his charge. There was certainly then even no apparent insanity manifested by Lawrence. His hat had been knocked off in the scuffle which took place, and, whilst they were forcing him along, he very calmly inquired after it, and asked that it might be returned to him. During the scene which occurred, it may be mentioned as an evidence of the feeling which generally prevailed, that one individual made his way



THE TRIAL.<sup>2</sup>

*In the United States Circuit Court, Washington, D. C., April, 1835.*

HON. WILLIAM CRANCH,<sup>3</sup> *Chief Justice.*

HON. JAMES S. MORSELL,<sup>4</sup>  
HON. BUCKNER THURSTON,<sup>5</sup> } *Judges.*

*April 11.*

The court opened at 9:30 this morning and Richard Law-

through the crowd and seized Lawrence by the throat, and exclaimed, 'Where is he? Let me see the d—dest rascal that ever lived! Now I've seen him.' After looking him in the face, he let go his hold. Lawrence was unresistingly conveyed into the yard of the Capitol, and from thence to the City Hall, where he underwent an examination before Chief Justice Cranch, and was committed to take his trial." From the pamphlet "Shooting at the President," *post*.

<sup>2</sup> *Bibliography.* \*"Shooting at the President. The remarkable trial of Richard Lawrence, self-styled 'King of the United States,' 'King of England and of Rome,' etc, for an attempt to Assassinate the President of the United States; containing also an engraving of the eastern portico of the Capitol, descriptive of what took place on that memorable occasion; with several particulars connected with the event, not before known to the public. By a Washington Reporter. Printed and published by W. Mitchell, 265 Bowery; and may be had of him, and the booksellers—1835."

This pamphlet has a picture of Lawrence on the title page. He is dressed in the costume of a gentleman of the day and in his outstretched hand is a pistol. In the middle of the book is a full page cut entitled, Scene at the Capitol. It depicts a group in the Rotunda of the Capitol. The attempted murderer is at full length on the floor, for he has just been felled by Old Hickory who stands over him with a walking stick swinging over his head. Around them are three of his cabinet—Van Buren, Woodbury and Dickerson—several members of Congress and other persons.

<sup>3</sup> CRANCH, William. (1769-1855.) Born Weymouth, Mass. Graduated Harvard 1789. Practiced in Braintree and Haverhill, Mass. Appointed (by his kinsman President John Adams) Judge of the Circuit Court of Washington, D. C., 1801. Chief Justice 1806. Prepared nine volumes of United States Supreme Court Reports, a code for the District of Columbia, and a memoir of John Adams (1827).

<sup>4</sup> MORSELL, James S. (1775-1870.) Born Calvert County, Md. Soldier in War of 1812. Practiced law in Washington, D. C. United States Circuit Judge, District of Columbia 1815-1863. Friend of Francis Scott Key and Chief Justice Taney.

<sup>5</sup> THURSTON, Buckner. (1763-1845.) Born Winchester, Virginia. Early removed to Kentucky, and received a classical education.

rence<sup>6</sup> was brought in, he having previously been indicted by the Grand Jury for shooting at President Andrew Jackson,<sup>7</sup> and pleaded *Not Guilty*.

He was dressed in a gray shooting jacket; black cravat and vest, and brown pantaloons. His appearance was that of a man perfectly at ease, and collected; but there was an appearance about the eyes, which in the opinion of many, was indicative of mania; and an evident assumption of kingly dignity in his demeanor and the expression of his countenance. He seated himself by the side of his counsel, and conversed,

Admitted to the Bar and practiced in Frankfort, Kentucky. Appointed United States Judge for the Territory of Orleans (declined). United States Senator, Kentucky (1805-1809). United States Judge District of Columbia 1809.

<sup>6</sup> "Richard Lawrence is stated to be about 35 years of age; some, however, say he is only 28. He is five feet seven or eight inches in height, rather slightly made, of a genteel figure, and possesses an intelligent countenance. The only thing in his appearance which might be supposed to indicate insanity, is a certain wild expression of the eye, which was much noted whilst he was undergoing an examination prior to being committed for trial. He is a native of England and came to this country, with his parents, when only twelve or thirteen years of age. His father died in Georgetown, D. C., six or eight years ago. He (Lawrence) possessed no religion, though he would sometimes read the Bible and attend church. His habits, it would seem, were generally speaking, correct; but an aberration of mind on particular subjects had been evinced for some years past. It has been remarked by those who knew him best, that he sometimes fancied himself to be—not King William, but King Richard; and, that this pretention procured for him among the boys of the neighborhood in which he resided, the title of 'King Dick!' and by which title, they used, in derision, to salute him in the streets. He is by trade, a painter, and had been deemed a good workman; and, until lately, had full employment in Washington and Georgetown. Dr. Clarke, with whom he served his time—(Dr. C. he it remarked, though now a Surgeon-Dentist, was formerly a painter)—gives him a very good character as to his previous habits. It appears that some time ago he had formed an attachment for a young lady, which was not reciprocal; and from that period he became more than usually melancholy, peevish, and quarrelsome. His demeanor since he was committed to prison has been in no respect turbulent or refractory, but generally taciturn, and he seldom refused to answer questions put to him." From the pamphlet, "Shooting at the President," *ante*, p. 525.

<sup>7</sup> See 2 Am. St. Tr. 865.

smilingly, with them. He is handsome and prepossessing.

*F. S. Key*, District Attorney, for the Government.

*W. L. Brent*,<sup>2</sup> and *J. F. Brent*, for the Prisoner.

*Mr. Key* rose to open the case, when *Lawrence* started up from his seat, and looking wildly around him, said, "What means this personal indignity? Is it decreed that I am to be brought here, and for what?"

The CHIEF JUSTICE. I desire that you take your seat.

The *Prisoner*. I desire to know if I, who claim the Crown of the United States, likewise the Crown of Great Britain, and who am superior to this court, am to be treated thus?

*Mr. Brent*. My client says he is superior to this court. Now, I apprehend, that as this is a case of misdemeanor only, it is not necessary that he should be in court. It is clear that we cannot proceed, if he is to remain here, considering the present state of his mind.

The CHIEF JUSTICE. Take your seat, Mr. Lawrence, and let your counsel manage the case for you.

The *Prisoner*. What I wish to know is, what difficulty—what power there is here, when I have the sword—

*Mr. Brent*. I would suggest to your Honors whether it is possible to proceed in this case. There is no necessity for all this excitement. I had rather myself, that Lawrence should remain here, if it could be done consistent with the fair administration of justice. But, I would suggest to your Honors, that under existing circumstances, it would be better for me to present him under the direction of the Court. I repeat, that it is not necessary in the case of a misdemeanor that a prisoner should be in court.

The CHIEF JUSTICE. We think it necessary that the prisoner should remain where he is.

*Mr. Brent*. Everything has been done by me to quiet the prisoner's feelings; but I have not been able to present any course of which he will make choice.

<sup>2</sup> BRENT, William L. Born Charles County, Md. Representative in Congress for Louisiana 1823-1829. Died 1848.

MR. JUSTICE MORSELL. It is always customary for prisoners to be in court in cases like the present. To permit him to depart would be altogether a novel proceeding. We would like the trial to proceed in the ordinary way.

The *Jurors* were then called.

The *Prisoner*. I wish to know whether or not this be a jury, for 'tis certain I am King—I am King.

The CHIEF JUSTICE. You must sit down, sir; and let your counsel answer for you.

The *Prisoner* (taking his seat). Do you remember that I am King of England, likewise of this country, likewise of Rome, and am protected by the law in my claim?

The following jurors were then sworn: H. L. Cross, Wm. Orme, John B. Furguson, Wm. Eaton, Benjamin Sewell, Paul Stevens, Charles Butler John Mount, Samuel Wilson, Edward R. Roche, Noble Herttell, Jeremiah Orme.

Mr. Key. Gentlemen of the Jury: The prisoner stands charged with an offense which was, at least in this part of the world, of very rare occurrence, which rendered it more necessary that I should give a statement as to the nature of the evidence which I should produce; and, further, because many rumors wide of the truth, as usually happened in such cases, had gone abroad. The prisoner was charged with an assault, with intent to kill and murder; and the object of the assault was the Chief Magistrate of the country. There were two counts in the indictment: one charging the assault, with intent to kill, etc.; the other stating more particularly the manner, instruments, etc. It was an offense, which was by our laws, a mere misdemeanor, and punishable by fine and imprisonment. The station, or office of the object of this crime, was to be left entirely out of the question; and it was to be considered in the same light as though committed on the most humble person in the country. The framers of our Constitution had not thought it necessary to surround the Chief Magistrate with any additional protection than those laws which were deemed sufficient for the citizen holding the most obscure station. The love of order and of justice had heretofore been

found, and I hope, will continue to be found, sufficient for this purpose. You are not to look on the extraordinary and providential delivery of the President from danger of the prisoner's act, but, free from any anxiety, to judge of the case according to the evidence which would be offered. (Here *Mr. Key* stated the particulars of the assault, the occasion on which it took place, the apprehension of the prisoner, etc., etc.)

The friends of the President, with a forbearance highly commendable, placed no further restraint on him—used no further violence, than to give him into the hands of the officer, where he had been ever since. When brought before the Chief Justice, no man could have acted with more calmness or intelligence. The jury had now to try whether the prisoner was laboring under insanity at the time the act was committed—under a delusion of mind at the precise period? Was the act which the prisoner committed, the direct and obvious offspring of that delusion? Did it spring from various vows of hostility and malignant feeling manifested by the prisoner? Or was it to be attributed to other causes? Or was it deducible from the delusion—the error which binds his reason, and makes him a lunatic on that particular subject? There could be no doubt that the prisoner had committed the assault. If he was capable of having any intention at the time the deed was committed, it was unquestionably with murderous intention. But if, on the contrary, however, he was under a total alienation of mind, why unquestionably, he was not to be punished. If he was laboring under a partial alienation of mind, then your duty would be to ascertain from the evidence, as nearly as you can, what was the particular subject of his insanity; and see whether you can connect the act he did with the delusion, so as to show that the delusion only had prompted him to commit it. There will be some attempts made to show that this man was affected with a mental delusion on a particular subject. If you are satisfied that the act which the prisoner committed was the result of the delusion under which he was laboring at the moment, and had been for some time

past, you will then have to ascertain (I do not mean to say that would be the result of the evidence you would hear, though I have no doubt that it would be clear as to his sanity at the period in question), by comparing the testimony with that offered on the other side, whether he was in such a state of mind as to be answerable for his deeds when the act was committed.

You will find, on investigating the testimony, as I had before stated, that both at the Capitol, and in this court, afterwards, no man could have displayed more calmness and steadiness of purpose and more prudence on hearing the testimony against him. The gentlemen of the jury will find also, from the evidence to be offered on the part of the United States, in reference to this act, that the avowal and acknowledgment of the motive was entirely unconnected with the delusion the prisoner was said to be, at times, laboring under. I will cite such authorities, in support of my argument, as I am sure will meet with attention and respect. There was a remarkable trial in England, not many years ago, which seemed to have settled the law on that subject, both in that country and in this—the celebrated and well-known trial of Hadfield, for the shooting at George the Third. Lord Erskine in his defense of Hadfield, had cited from Howell's State Trials the case of Arnold, for shooting at Lord Onslow, and I take no substantial exception to the doctrine laid down by the learned Judge who presided on that occasion; but accede generally to it—that it was not every man who was a lunatic that could be said to be deranged. A general impression, however, prevailed among the people that a man who was deranged in his mind—no matter what he might do—was not subject to punishment. Now, that is not the case. There were lunatics who could control their disposition to commit crime, as well as other people, in some instance or instances, whilst in others they could not. No rule could be adopted to discriminate between the commission of certain acts, by individuals, who were at times affected with lunacy, except the exercise of common sense and judgment in relation to the general conduct

of the party committing the act. I trust that when I shall have laid all the evidence in my possession before you, you will extend every possible indulgence and liberality towards the prisoner. If, when you have heard all the testimony, you should be of the opinion, that, at the time he committed the offense, he was acting under a delusion of mind—not knowing what he was about, and that the delusion directed him to act,—then you will, of course, find him Not Guilty. But, your duty requires you to weigh well the whole matter—to see whether, or not, he was a man of capricious humor, but not so devoid of understanding as not to know what he was about. Deluded he might be on a particular subject, but if his delusion was unconnected with this act, then the act must have sprung from other motives, and he should be held accountable as well as any other man.

I, as the United States District Attorney, would lay before you not only evidence of the manner in which this act was attempted to be perpetrated—of the apprehension of the prisoner—of being brought before the Judge; but I shall exhibit in your presence the very instruments with which the act was attempted to be committed. You will see in those deadly weapons, instruments as well calculated to accomplish his diabolical purpose, as could possibly be obtained. You will also remark the condition of the pistols as they were presented to the Court after the apprehension of the prisoner. The narrow escape of the President from a violent death must be looked upon as a signal and remarkable interposition of Providence; and nothing could show more plainly the deadly and hostile purpose of the prisoner. Lunatics might reason on some subjects with great accuracy, and on others not at all. The conduct and whole demeanor of the accused were circumstances which ought to be taken into consideration by the jury, in order to enable them to make up their minds as to the issue that was then before them—which was the guilt or innocence of the prisoner; for, upon that guilt or innocence depended the fact of his being accountable as a human agent at the time the act was committed.



## THE WITNESSES FOR THE PROSECUTION.

*Mr. Secretary Woodbury.*<sup>10</sup> On the occasion of the funeral ceremony in the Hall of Representatives, on the death of one of its members,<sup>11</sup> I attended, together with the president and other officers of the Government; I had listened to the funeral service in the Hall; I left it; the President being on my right arm; had passed through the rotunda, and through the eastern door, where we came to a halt (being in the rear) in consequence of the delay occasioned by the gentlemen who had preceded us getting into the coaches. We had perhaps passed some two or three steps on to the portico, when I heard a noise like the discharge of a pistol; was to the left; looked round directly, and there saw a person, about six or eight feet, a little to the left, who was just in the act of lowering his hand when my eye caught him. It was the prisoner at the bar; saw him distinctly when I turned, and saw the pistol in his hand; presumed he was the person who had fired; it was directed right towards the President. At first I doubted whether it was not myself who was aimed at; but saw then that it was towards the President, who was on my right; turned to the President to see if he was injured; seeing he was not, turned to look for the pris-

oner; he was then in the act of raising his hand again; had something in it; presumed it was a pistol; was not certain whether it was the same or another; thought probably it might be a double barrel pistol; gave a pull from the President's arm, and sprung towards the prisoner; seized him by the collar, at the moment the second explosion took place; other persons had previously got hold of him, which put him rather out of his first position; they continued to pull him, with some violence, in a somewhat opposite direction. Seeing he was secured, and that there was reason to believe he had no other weapon, I let go my hold and turned to see what was the state of the President after the second discharge. The prisoner was dragged forward towards the front of the piazza, and I saw no more of him until I saw him here an hour after; found the President in the crowd and went home with him; afterwards went to several magistrates' offices to see what had become of the prisoner; not finding him, came to this room, where he had been brought for examination. Mr. Burd, a member, shortly after arrived, bringing with him two pistols (which were produced).

*Mr. Secretary Dickerson.*<sup>12</sup>

<sup>10</sup> WOODBURY, Levi. (1789-1851.) Born Francestown, N. H. Graduated Dartmouth 1809. Attended Litchfield Law School, and admitted to Bar 1812. Judge Supreme Court 1817. Governor New Hampshire 1823-24. United States Senator 1825-31, and 1841-45. Secretary of the Navy 1831-34. Secretary of the Treasury 1834-41. Justice United States Supreme Court 1846-51.

<sup>11</sup> DAVIS, Warren B. (1793-1835.) Representative in Congress 1825-1835.

<sup>12</sup> DICKERSON, Mahlon. (1770-1853.) Born Hanover, N. J.

After hearing service in the Hall of Representatives on the day in question, I moved in the procession, and had advanced about two steps from the door, when I heard the discharge of a pocket pistol; turned, saw some man had laid hold of an individual; I was to the left of the President; saw Lieutenant Gedney, and supposed he was trying to get the man down, but could not see the man; it was some seconds before the prisoner could get his second pistol; and when he did, from his altered position, he had to throw his arm over to get aim at the President; certain it was aimed at him; was very near; saw the prisoner distinctly; saw the size of the pistol, but could not say whether it was brass or steel; it appeared that it must have struck the President had a discharge taken place; in a second from this time, the prisoner was crushed to the floor, but was soon raised again. Mr. Gillet, a member from New York State, a very strong man, had hold of him, as also had Lieutenant Gedney; looked at the prisoner, and kept my eye on him, so as to be certain of his identity. About the instant the second explosion took place, the President had lifted his stick, to strike the prisoner, but made no blow, being prevented by his friends.

*Cross-examined.* Should have said on the day, that the dis-

tance of the President from the pistol was eight or nine feet; had since ascertained it was twelve or thirteen. Saw it ascertained by a pencil-case, in court, that the pistols were loaded; saw the charge of one of them drawn; the powder was fine. Prisoner was perfectly cool during his examination; said he had no wish to question the witnesses; recollect his saying, "that must be proved;" understood him to mean that he did not confess the act. The President was about three feet from me, on the right; no one was between us; did not see the first explosion, but heard it; saw the second; do not know if both were from the same pistol; think the second was not so loud as the first; was a great crowd coming out at the door; did not hear Lawrence say, it was at the President he directed the pistol; but formed the opinion from what I saw.

*Lieutenant Gedney.* At the time of the assault was entering the door of the eastern portico, going into the rotunda; I observed the President with Mr. Woodbury; they had advanced two or three steps from the door; observed some movement in the crowd; turned and saw this man with a pistol; I seized him by the shoulder and got him down; he dropped the pistol; there were two; Mr. Burd had the pistols; some five or six persons

Graduated Princeton 1789. Admitted to Bar 1793. Practiced law in Philadelphia. Recorder City Court of Philadelphia 1808-10. Judge Supreme Court New Jersey and Chancellor 1811. Member of State Legislature 1814. Governor of New Jersey 1815. United States Senator 1817-1833. Secretary of the Navy 1834-38. Afterwards United States District Judge of New Jersey. Delegate to State Constitutional Convention 1844. President American Institute 1846-48.

seized the prisoner, and I then lost sight of him; examined the pistols with Mr. Burd; did so with a pencil-case; both were loaded; saw nothing further till I saw the prisoner in court; I took one pistol, Mr. Burd the other; examined them both directly; saw but the first discharge; the pistol was apparently aimed at the President.

*Cross-examined.* Was at about the distance of eight feet from Lawrence and at about an equal distance from the President, on the left; was directly between Lawrence and the President; was a great crowd at the door. Had hold of him at the time he snapped the second pistol.

*Mr. Secretary Dickerson* (recalled). The President spoke angrily to those who prevented him from getting at Lawrence; and said, "let me alone! let me alone!" Recollect hearing him also say, "he knew where this came from!" Understood he did say more.

*Mr. Hunter.* Am United States Marshal. Seized the prisoner a few moments after he had been disarmed and brought him before Judge Cranch; was present on his examination; am sure the pistols now in court are

the same; they were marked at the time; saw the bullet extracted by a ramrod; believe by Mr. Blair; there was a patch on the ball; the pistol was charged in the usual way; there were other percussion caps, balls, etc., found in the prisoner's trunk, also in his pocket; saw the powder in the other pistol; took one of the caps found on Lawrence, and fired that pistol; the ball passed through one plank, and nearly buried itself in a second some yards beyond.

*Cross-examined.* When Lawrence was conveyed from the Capitol, in the hack, he appeared perfectly collected; said his reason for the act was, that the President had killed his father, that his influence was so great that he had got every one to persecute his father, so that he died poor.

*Judge Cranch.* The prisoner on the occasion of his first examination, was asked if he wished to put any question, after the examination of each witness. He did not appear absent in mind, but rather regardless of what was going on. On one occasion he did say, "I cannot contradict what the gentleman has said."

*Mr. Brent* asked permission for the prisoner to leave the court. It was painful to all that he should remain; particularly so to myself, as his counsel; and the law did not require his presence.

*Lawrence.* What I have done to Jackson is on account of money which he owes me; I have come here for that purpose! I consider all in this court under me; the United States Bank has owed me money ever since 1802, and I want it; I must have my revenue from the bank. You are under me, gentlemen! Marshal, mind your own business, or I shall treat you

with severity! It is for me, gentlemen, to pass upon you, and not you upon me!

*Mr. Brent.* Your Honors, spare the jury this painful exhibition, by permitting Lawrence to depart in custody of the Marshal. Why should the prisoner be detained on this any more than on other similar occasions? I feel, for my own part, that I could not do justice to the cause of the prisoner, if he sat beside me; the very fact that I should take a course in defense of the prisoner with which he was displeased, would prevent it. I hope the learned counsel for the prosecution will permit Lawrence to leave the court.

*Mr. Key* hoped it was not understood that he objected to that course; he was neutral on the subject; he had himself no power to grant him leave to depart.

The COURT was of opinion that Lawrence should remain until proven to be insane. He would, however, be permitted to withdraw, if it was his own wish to do so.

*Lawrence.* I deny the power of this court to try me; I am superior to it—am my own man, and what I want is my revenue.

*Mr. Brent* told him he would have his rights. “Ay, but when?” “To-day,” replied *Mr. Brent*. “You will let me have my funds to-day?” said the prisoner earnestly. “Yes, to-day, Mr. Lawrence.” “Very well, sir!” and he immediately resumed his seat on this assurance.

*Mr. Brent* thought it quite unnecessary to trouble the Court with any observations as to the law governing this case, as it had been fully and ably laid down by the District Attorney. He would merely proceed to call witnesses in regard to the state of mind of this unfortunate man.

#### WITNESSES FOR THE DEFENSE.

*Mr. Redfern.* Have known Lawrence for sixteen years; I married his sister; first observed a change in him in 1833; in the fall of 1832 he left Washington intending, he said, to go to England; he left in November,

and returned again in December, assigning as a reason that the weather was too cold; the next spring he started to go to New York or Philadelphia; he got no farther than Philadelphia; on his return this time, he

said the people would not let him go; that this government opposed his going; that I and others prevented him; that he should not be able to go, until he got a ship and captain of his own; that when he got to Philadelphia, he found all the papers so full about him, that he was obliged to come back. After this he remained in my house six months, but did nothing; said he had no occasion; that he lived on his people; it was very well for men such as me to work, but he had no need; that he had large claims on this government which were now before Congress; he used to attend Congress regularly. He left my house in January, 1834; previous to this he got quarrelsome with his sister; said the colored girl laughed at him, and that he would kill her; said that other people also laughed at him; he struck all his sisters on several occasions and once took up a four pound weight to throw at my wife; have seen him pass since this time but never have spoken to him since 1833; he would go about the house without speaking for days together, but would talk and laugh to himself continually in his own chamber; it was the general impression of the neighbors that he was insane from the beginning of 1833; his father died on Capital Hill—about the year 1821 or 1822. Lawrence held no estates in England, of course not; my belief is that Lawrence is insane, not merely on one subject, but is suffering under general derangement.

*Cross-examined.* When Lawrence struck my wife, I took him before Judge Waters; he told the Magistrate he had no power

over him to commit him; do not recollect if I represented him as a madman; he has done very little work since 1833; never knew him to drink. He is a painter by trade; used to amuse himself by drawing landscapes, sometimes till 10 or 11 o'clock at night.

*Samuel Drury.* Have known prisoner twenty-five years; for the last year have observed a change in his conduct; he would talk to himself continually in his shop; he would sometimes say, "d—n him, he does not know his enemy; I will put a pistol—erect a gallows;" he conceived himself to be King Richard the Third of England; and likewise king of this country; that was about the latter end of December, or beginning of January. After that I heard him say, "d—n General Jackson! who's General Jackson?" On one occasion a black boy called to collect a bill, and Lawrence said he would call and pay it; but as soon as the boy had left, he said, "d—n him! he don't know who he is dunning!" He would stand at the door for hours, wrapt in thought; and even when I passed him took no notice of me; he was continually talking to himself; and would now and then burst out into fits of laughter; noticed no particular change in him as to dress—he was always fond of dress—but did in his conduct and appearance; have often said he was a crazy man, and have heard others say so; have heard the boys call him King Richard; on the morning of his attack on the President he came to the shop at the usual time and went to a place where I could see him through a partition; he was sitting on a chest

with a book in his hand, laughing; I heard soon after the lid of the chest fall, and him say, "I'll be d—d if I don't do it." He then left the shop, and locked the door. Do not know what book he was reading.

*Cross-examined.* Lawrence would converse rationally on all subjects on which he would converse—about landscape painting; he would not talk on other subjects; not about politics; do not know to whom he alluded when he used the oath I mentioned.

*Mr. Handley.* Have known prisoner fourteen years; he was very steady, and remarkably reserved in his manners. After his return from New York in 1833, when he was to have embarked for England to improve himself in landscape painting, noticed a great change in his manner from this time; he was evidently under some strange impression; after this he hired a horse frequently to ride to the Capital; he wanted to purchase one, but was persuaded it would be better to hire one; he bought a saddle and bridle, however; he became also very fond of dress; would change his dress three or four times a day; there was not a boot-maker who could fit him; and he would stand at the door for hours and speak to no one; he did no work all that summer, nor during the winter; was standing near Mr. Redfern's store, when Mrs. R. came out and complained to her husband of Lawrence's conduct, saying that she could put up with it no longer; Mr. R. said nothing; she went in and Lawrence took her by the shoulders, and either pushed or knocked her down; while she was down he snatched

a four pound weight from off the counter; either myself or Mr. Redferd then seized him; said he would go to jail if Mr. R. would go. The officer told him he would have a fine room, well furnished, where Mr. Watkins used to be; he was pleased and said he would have his paintings there, and be very comfortable; after this he resided with another brother at the Navy Yard. His sister applied to me in June last to get Lawrence some work; she seemed to be under the impression that he was deranged and thought work might settle his mind. Prisoner expressed his fears that no one would give him work; got work for him at Mr. Purdy's; he worked two or three weeks then left on the ground that he could not work for the same prices as other men. He worked, however, again for Mr. P. in November; thought he was deranged, and so expressed himself to several persons.

*Cross-examined.* Had not considered him as deranged on all subjects; knew that he had laid claim to this and the English Government.

*Dr. Clark.* Prisoner lived with me three years over eight years ago; was a remarkably fine boy; rather an exception to the general order of boys; reserved in his manners; but industrious and of good moral habits; of late thought there was a strange difference in his appearance and manners; he was always neat and cleanly, but of late, been much given to dress; had worn mustaches, too; had thought his mind had undergone some change; an altered appearance about the eye; betrayed a want of comprehension on subjects with which he ought to have been



better acquainted than myself; frequently observed him stopping at the corner of streets and gazing around. The day before the attack on the President, noticed the peculiarity of Lawrence's gait and general appearance. When he got opposite the gate leading to the President's house, he stopped; stood gazing there; after riding some way I turned in my saddle, and saw him still standing there; had considered him insane for the last eighteen months.

*James Freyer.* Lawrence boarded at my house for eight weeks; when I spoke to him about money, he would say that he should have millions; that Congress owed him a large sum, and he had to attend there, on the subject, to get it; that he had also large estates in England, and was related to the Crown; on other subjects, he would talk at one time very rationally, and at others, equally irrationally; one afternoon he threatened to blow Mrs. Freyer's head off, or cut her throat; then I told him he must quit; this was some time in July; did not consider him sane or safe from the time he left my house. In October I was going past his shop, and said, seeing him there, "Lawrence, how do you do?" His answer was, "Go to h—ll! what's that to you?" Told him I had a due-bill of his, and must have my money; he remarked, "you mean to warrant me for it, I suppose." I told him I did not know whether I should or not; "if you do," he said, "I will put a ball through your head." I took out a warrant; and after some difficulty he was brought up to Squire Waters' office, who observed that he did not consider Lawrence

sane; said I did it more to show him I was not afraid of his threats than on account of the money; had no conversation with him since that time. He always appeared insane to me when money matters were talked of; do not mean to say I believe him totally deranged.

*Mr. Cuvillier.* Have noticed an alteration in his conduct for eighteen months past; Mrs. Redfern requested him to leave, but he would not; my wife is sister to Lawrence; I endeavored to persuade him to leave, but could not. The reason he assigned was he had a book in which he found out that a large fortune was left him in England; said he had no deeds or papers; saw the book afterwards, it was an old book entitled Entick's British Empire, printed in 1774; had remonstrated with him on his foolish notion, and told him his best fortune was in his fingers, and that if he did not leave, Mr. R. would put him in jail; he said they could not, and that no person yet knew who he was; that was the first time I discovered him to be insane; since then he has boarded with me; used to attend Congress every day; would not work; when urged by his sister, replied, "Oh, you are a fool, you know as well as I, what my claim is!" He left my house and we saw no more of him until last October; he then agreed with me to paint my house, but did not undertake it; it is the opinion of all his friends that he has been deranged for the last eighteen months on particular subjects.

*Mr. Smith.* On Lawrence's return from New York, he came to purchase a horse; persuaded him to hire one instead, and he



did so; he then said I had not a saddle good enough, and bought one for himself; he hired the horse four or five times a week; in 1833 he became extravagant in dress; had two suits sent home in one day; said none would fit, and that the tailors had entered into a combination to spoil his clothes; in the spring of 1833 first remarked a change in him; he became violent, and immoral in his habits; had frequent difficulties with his sisters on that account. He now hired two horses, one with a side-saddle; was frequently riding about with a female, who was discovered to be a woman of loose character. Mrs. Redfern then insisted he should leave the house, which he refused to do. One day at dinner he seized Mr. R. by the collar; Mr. Redfern told him that he should insist on his leaving. I advised him, if so, to get a warrant; but thought it would be better to get him locked up in the poor-house as a deranged man, where medical aid might be had, and his mind possibly restored. He was in the habit of firing pistols out of the window at night, and committed various other acts of violence during the summer; considered Lawrence as a man of unsound mind for some time past.

*Cross-examined.* Should think he had lost all sense of right and wrong; believe he would as soon have shot his own sister as the President.

*Mr. Laskey.* Have known Lawrence twenty years; his father was my uncle; was himself deranged, and confined in a room frequently, in England; and Lawrence's aunt died deranged in the District.

*Mr. Purdy.* Had always thought Lawrence's conduct curious; was always talking to himself; frequently burst out into fits of laughter; never associated with any one.

*Mr. Gillespie.* Had worked with Lawrence; his conduct was so strange that I was afraid to work with him; thought him mad.

*Dr. Magruder.* Attended Lawrence a year ago for a local disease; he talked so incoherently was satisfied he was deranged; no man in his senses would have given such reasons as he did; considered Lawrence at that time mad on all subjects; but did not try him.

*Dr. Hall.* Have visited Lawrence twice; considered him laboring under a morbid delusion on a particular subject, and which has so deeply affected his mind, that its effects have extended nearly to all subjects; he can talk rationally whilst you keep him from one subject, but it is very apt to run into that from any and every subject; should distrust his judgment on any point whatever, for the reason he always manages to connect the subject of delusion with other subjects; believe his attack on the President was so connected, and that therefore he was not capable of judging right from wrong as to that act; believe it, if so, to have been an act of insanity; cannot of course, tell what might have been his temper at that time; saw him last Monday. In the first place asked his name; he said Richard Lawrence, and that it was the family name, and descended from the Crown of England. My object was to induce him to converse on subjects not connected

with the subject of his delusion; he voluntarily stated his supposed descent; asked him as to his education; he said he was not sent to school in England; but that after he came here, his father put him with a painter, which he thought very strange, because as he was heir to the Crown, he thought he ought to have been sent to school to fit him for his station. He said the Government of Rome and Holland, and this country, properly belonged to him; he said as to his attempt on the President, that he had no personal hostility towards him, but that he stood in his way, opposed his just claims, and therefore, he was determined to destroy him. He thought he had a party in this country that would espouse his cause, and that as soon as the President was removed, his successor would give him his rights; he spoke also in a like incoherent manner about the bank; believe, from the conversation of Lawrence, his state is that of morbid delusion; and the only question is—is it genuine or pretended? I believe it is not feigned. Both conversations I had with him were of a similar character. He relies in Mr. Brent's power to get him out of jail, and procure his rights; should call Lawrence a lunatic.

*Dr. Sewell.* Lawrence had said that Jackson had been an enemy of his family ever since he was a boy; he complained that Jackson withheld from him the funds of the bank of which he was the rightful owner; would treat Van Buren, or any other, the same way if an attempt should be made to punish him, all the Powers of Europe would rally to his aid; his object in

calling on the President was to get money to assist him to go to Europe, where he had now a correspondence; he considered Jackson as nothing more than his clerk, and the cause of all his troubles, his loss of business, etc.; and believed he was league<sup>d</sup> with his brother, S. Redfern, to injure him; he was not apparently able to assign the process by which the removal of Jackson was to enrich him; believe him to be laboring under mania—to be a madman; and do not consider him as possessing a judgment of right and wrong; certainly not as to any thing connected with General Jackson; do not consider him as a moral agent; and think his attempt on the President the act of an insane man; do not believe his madness feigned; believe, if it were, it would be easy of detection.

*Cross-examined.* Lawrence said he changed his position to avoid wounding Mr. Woodbury; said that the President was the cause of injuring him along with other mechanics; that if he were removed, money would be more plentiful. In pursuing many of his propositions, he was not able to follow them out; said that General Jackson was a tyrant; that he read it in all the papers; believe he was laboring under hallucination—am not sure it extended to all subjects, as I have not examined him on all.

*Dr. Baker.* Believe him to be laboring under total derangement as to his supposed claims; and that as to any thing connected with that subject he is incapable of distinguishing betwixt right and wrong; think it very difficult to feign monomania so as to deceive a physician; believe

it was not general insanity, but confined to one subject, namely, that Jackson is standing in the way of his claims.

*Dr. Causin.* Noticed that some of the physical appearances of insanity were wanting in Lawrence; the usual excitement when the subject of delusion was introduced; could not

say that there was any proof, however, that Lawrence's disorder was feigned; and if not, it was an act of insanity.

*Mr. Ball.* Am prison-keeper; Lawrence was insensible to external cold; he would let his fire go out on the coldest day, and sit in his shirt sleeves.

*Mr. Brent* said he would not trouble the jury with any remarks, but leave them to decide on the evidence they had heard.

The COURT handed to the jury the verdict given in the case of Hadfield.

The *Jury* then retired, and in about five minutes returned the following verdict: "We find him *Not Guilty*, he having been under the influence of insanity at the time he committed the act."

The COURT ordered that *Lawrence* should be remanded, and made as comfortable, and treated as well as his situation would permit, until some further provision could be made to prevent him from doing further mischief.

# THE TRIAL OF CYRUS B. DEAN FOR THE MURDER OF JONATHAN ORMSBY AND ASA MARSH, BURLINGTON, VERMONT, 1808.

## THE NARRATIVE.

This story can be briefly told; it is the story of a band of men who in Vermont in the year 1808 made profits by smuggling potash across the lake into Canada. The Federal revenue officers were active in their watch, and one day the Commander of the revenue cutter, *The Fly*, receiving notice that a smuggler with the suggestive name of *The Black-Snake* was in its vicinity, proceeded with his crew to capture it. They found it in a river not far off, but the smugglers resisted, and in the fight which resulted two of the crew of the Government boat were killed. Cyrus B. Dean and others were indicted for murder and Dean, who was shown to have been most active in the fight and to have fired the "big gun," was convicted and sentenced to be hanged.

## THE TRIAL.<sup>1</sup>

*In the Supreme Court of Vermont, Burlington, August, 1808.*

HON. ROYALL TYLER,<sup>2</sup> *Chief Justice.*

HON. JONAS GALUSHA,<sup>3</sup>  
HON. THEOPHELUS HERRINGTON, } *Associate Judges.*

*August 27.*

On Friday, August 26, the Grand Jury of Chittenden

<sup>1</sup> *Bibliography.* \*"The Trial of Cyrus B. Dean, for the murder of Jonathan Ormsby and Asa Marsh. Before the Supreme Court of Judicature of the State of Vermont, at their special sessions begun and holden at Burlington, Chittenden County, on the 23rd day of August, A. D. 1808. Revised and corrected from the minutes of the Judges. Copyright secured. Burlington. Printed by Samuel Mills. Sold at his bookstore, by Mills and White, Middlebury, and by the principal booksellers in the United States. 1808."

<sup>2</sup> TYLER, Royall. (1757-1826.) Born Boston, Mass. Chief Justice of Vermont 1800-1826. Besides being a lawyer and jurist and the Reporter of the Vermont Supreme Court Cases, he was the author of several comedies and tales.

<sup>3</sup> GALUSHA, Jonas. (1753-1834.) Born Norwalk, Conn. A sol-

county presented a bill of indictment for the murder of Jonathan Ormsby and Asa Marsh against Samuel I. Mott of Alburgh, William Noakes of Slocum, Clark Truman Mudget of Highgate, Cyrus B. Dean and Josiah Pease of Swanton, David Sheffield of Colchester and Francis Ledgeard of Menton.

On the same day Samuel I. Mott, Cyrus B. Dean, Truman Mudget, Josiah Pease and Francis Ledgeard were arraigned on the indictment and severally pleaded *Not Guilty*, and demanded separate trials.

The COURT. Mr. Attorney, in what order do you propose to bring the accused forward for trial?

*Mr. Harrington.* I propose to commence the prosecution on the part of the State, with the trial of Samuel I. Mott, and to call Cyrus B. Dean to the bar next.

*August 29.*

The trial of Samuel I. Mott commenced and occupied the Court until Thursday, August 31, at 11 p. m., when the jury returned their verdict into court.

*September 2.*

Cyrus B. Dean was put to the bar for trial, but the challenges, peremptory and for favor, were so numerous, that after an ineffectual attempt to fill the panel the COURT ordered a new venire for petit jurors, and adjourned.

*September 3.*

The whole bench was present and the prisoner was put at the bar.

After one challenge for favor, the following gentlemen were impaneled and sworn: John Brown, Foreman; Parker Tallcott, Zacheria Hart, Joy Bradley, Elisha Emmons, Jr., Jasper Griffith, Samuel French, Jesse Gloyd, Benoni Thompson, Arnold Stephens, Jas Stephens, Jr., Asa Moon.

dier of the Revolution and served at Bennington, Vt. Member of Council (Vt.) 1793-1798. 1801-1805. Member of General Assembly 1808. Judge Supreme Court 1795-1808. Governor of Vermont 1809-1813, and 1815-1820.

*Chace Harrington*, State's Attorney, *David Fay*, District Attorney, and *Cornelius P. Vanness*,<sup>4</sup> for the State.

*Amos Marsh* and *Bates Turner*, for the Prisoner.

The *State's Attorney* opened the cause on the part of the state, by stating the law and the facts which he expected would appear in evidence, and called the following witnesses:

#### THE EVIDENCE FOR THE STATE.

*Josiah Edson*. On last day of July last was on board the *Black Snake*, when passing the Lake from the Province of Canada into this State, Truman Mudget, Samuel I. Mott, Day, Slocum Clark, Capt. Pease and the prisoner, Dean, were on board; each man had a gun by him, Mudget, who was captain, had two, and there was one gun without a lock; understood by them they were coming to Onion river, and some other place near Burlington, after potash, to run into Canada; this was the fourth time this boat had gone to Canada with potash, and they always went well armed, but not so strongly as lately. This time they had a number of clubs, several spike poles and a basket of stones, each about as big as a man's fist, on board. The poles I understood were to keep off the revenue boats and the stones to defend themselves with. The captain's orders were not to fire until they were fired upon, to endeavor to escape; if they could not, then to fire as straight as they could, and do as much execution as possible; they were to use clubs and stones first; understood they had from eight

to ten dollars a trip and the captain paid them, and he had five or six dollars per barrel for running the potash; parted with them at Hogg Island, about four miles from where they started; they had not the big gun then with them; they all said they would fight their way back to Canada; they had not much ammunition and but ten bullets among them.

*Stephen Pearl Lathrop*. Live with Col. Stephen Pearl, in Burlington village, who owns an intervale farm on the south side of Onion river; one Magery Joy is the colonel's tenant; about nine Tuesday morning, second of August, was at Joy's house, a few rods from the bank of the river, and there came there seven men of the crew of the *Black Snake*, said to be a smuggling boat; they went to cooking fish; went to the field to work with James M'Kenzie and George Sheffield; about eleven we heard firing of several guns; one report was much louder than the others; sent M'Kenzie to turn some barley near the house, he returned and said there were men there with guns; we pulled flax; at sunset I went to the

<sup>4</sup> VAN NESS, Cornelius Peter. (1782-1852.) Born Kinderhook, N. Y. Representative 1818-1821. Chancery Judge of New York 1821-1823. Governor 1823-1826. United States minister to Spain 1829-1839. Collector Port of New York 1844.

barn and saw two men asleep on the floor; then went to Joy's house; saw Mott, Mudget, Perkins and prisoner there; saw one or two guns in the house, and the large gun resting on the outside of the house; returned to Col. Pearl's and lodged, and the next morning went again to the intervale, when George Sheffield told me the revenue boat was coming up the river; soon after joined the smugglers, who were drinking under some butternut trees on the bank of the river below Joy's house; prisoner, Captain Pease, Slocum Clark and William Nokes were present; they had seven muskets leaning against the trees; they invited me to drink and told me they had heard of the revenue boat's coming up, but they were prepared to meet them; they said Mott and David Sheffield were gone down the river to see if the boat was really coming, and that David Sheffield said he could bring a gun as well as not; they all said if the revenue boat came up, they should sup sorrow; they had bullets in their pockets; they took them out in their hands and called them blue pills; said we had better bring the great gun down; and prisoner went and brought it from the barn; soon after, George Sheffield brought his brother David over the river; asked what news? he replied "bad enough, there is a boat coming with thirty men, twenty-six of them rowing;" Day asked if the boat had not a red rim; he said yes; Day said, it is a damned lie, I know the boat well; I think there can but ten men row; David brought a gun with him and two powder horns, one empty, the other had powder

in it; he soon after loaded his gun and one of the party said to him, "Though you are small, you can take good sight;" he replied, "by God I can take as good sight as any of you," and offered to bet with any of them at shooting at a mark; some one observed that the large gun would do better execution if charged with rolled bullets; they then drew the charge which was a handful of slugs or bullets beat square; saw them put the bullets into the gun and as one dropped the last he said "this makes fifteen"; soon after, Mott came opposite on the north side of the river and was brought over in a batteau with two men; they said here comes Mott and now we shall know about it; Mott told them that he had seen the boat, that there were fourteen men in it and one had regimentals on; Day said, David Sheffield, did I not tell you, you told me a damned lie? Mott said, they are coming and we must prepare for them, and advised taking the sails and oars out of the batteau, which lay at Joy's landing and belonged to Hall, whilst he and Mudget would do the same to the Snake, which lay sixty rods above; Day proposed to go to the revenue cutter and tell them the Snake was not in the river, and if they came up they would soon see their God, as there were thirty armed men above; after Mott and Mudget returned from the Black Snake, Mudget and Day went towards the revenue boat without arms and soon returned; at first they talked of placing the large gun near Hall's batteau, but Mott observed it was foolish to guard Hall's boat and some one said, "it is



no small matter to kill men and have to flee our country; we did not come up in Hall's boat and it's foolish to fight for it"; some of the party were very noisy, Mudgett told them to be silent; said they would be overheard by the revenue boat's crew, and the man who talked the loudest would be the first to cow out; all but Day went with the large gun and their other arms towards the Black Snake; Dean carried the large gun and Mott the ram rod; the revenue boat soon came up to the batteau; the lieutenant asked who owned her? Day said, "I have the care of her and while I have, I own her"; the lieutenant said I have orders to take all boats I suspect to be concerned in smuggling; the lieutenant then asked Day where the Black Snake lay; he told them she had gone out of the river the night before, laden, and said, did you not meet her? She was within eight feet of you; the lieutenant then went to Joy's house, and when he returned, Day said, you had better take the batteau, he replied, I will go further up the river and call and look at her on my return, and then ordered his men to row up the river. We went towards where the Black Snake lay, and soon saw the Snake's crew retreating; Mott and the prisoner Dean were forward; Dean had the great gun and Mott a small arm; we turned and went down the river; they halted at the butternut trees; Dean said, "we will not go with them they are damned cowards"; Mott said, "I will go home, I will have nothing more to do with them"; Mott and prisoner then conversed together aside, so that I could not hear

the whole conversation, but heard prisoner say, "if you have a mind to be crooked, I can be as crooked as you"; Mott took up the great gun and proceeded down the river; the prisoner stayed; observed that his brother-in-law, Mudgett, was a damned coward, he wished he was burnt to death; he wished he was scorched with wet powder so as not to quite kill him. The revenue boat and the Black Snake came in sight, rowing down the river; the other smugglers with Mudgett came on; Mudgett said come on boys, they shall never go out of the river alive; all the crew that went up to the Black Snake had now passed down with their arms except Capt. Pease; heard Ledgerd and others threaten the soldiers on board the boats and say you never shall go out of the river alive; heard the lieutenant say I have taken the boat according to my orders and if you intend to fire, here I set as a mark; observed to M'Kenzie, let us go back to our work, for they dare not shoot, and we turned back and soon heard a gun fired, when I observed they have only fired in the air to scare them; we then heard two or three guns and we ran down the river, and while running, heard a number of guns fired; I saw David Sheffield coming out of the brush; I said, "in God's name, David, what have you been doing?" he replied, "I have not killed a man, I have not fired a gun"; I said where is your gun? he said, "I have thrown my gun away that they should not say I fired"; I said David is your gun loaded? he said, no; I then said you know I saw you load it; he replied, you don't want to hurt

me, Pearl, do you? I then ran further down the river, through the brush, saw the Black Snake and revenue boat in the river; the Black Snake was furthest down the stream, the revenue boat had but one man in her as I could discover and he was rowing with one oar; stepped into the road after I had ran some rods and saw Mott with the large gun on his shoulder; saw Dean and heard him hollow, "fire, why don't you fire? they will all be upon us, they are coming up the bank"; Mott then put the large gun across the corner of the fence and fired; Dean was standing then in the edge of the trench, and I was about three rods behind Mott; I jumped over the fence and ran across the cornfield; never saw Mott afterwards until in prison; saw the lieutenant passing up the road with a handkerchief round his head, and another round his arm, all bloody; he said, they have wounded me; I do not know but mortally, but I do not mind that, but they have killed two of my men and one of your neighbors, and I am sorry for what is to follow.

*David B. Johnson.* Was sergeant under Lieutenant Farrington; in August Dr. Penniman, the collector, asked the Lieutenant to make an expedition after the Black Snake, which we had frequently heard of as being concerned in smuggling; that night went with the Lieutenant in the revenue boat Fly, to Messisque bay, on the west side of Hogg island; on Tuesday, the second a man told us that the Black Snake had gone into Onion river; he gave us the names of those on board; he mentioned eight men; the pris-

oner was one; told us he would meet us again at the sand bar; we rowed to the sand bar and remained there all night; Wednesday morning we got to Colchester point; landed and breakfasted; I crossed the Point to gain information; met a man who took me for a smuggler; asked me if we were after a load; he said there would be no difficulty in getting a load in the river, but the Black Snake's crew had obtained intelligence that the revenue boat was coming after them. Proceeded up the river in the Fly, and were confirmed that the Black Snake was up the river; met two men coming down the river's bank; one was Day; he asked if Dr. Wood was on board; said he had some especial business with him; I said, Day, is it you? Day said, what, you are going up the river after the Black Snake, are you? I told him we were; he said we should not find her, that if we went up the river we should find something more terrible than the Black Snake, for there were thirty men armed; I said, "Boys, row on"; Day ran and the man ran before him up the river; saw no more of Day until we come to Joy's landing, where we saw Day in Hall's batteau; Day said, are you going to take this boat? the Lieutenant said if it is a smuggling boat, I shall; I have orders to take all suspected boats, and if this is one, I will take it; the Lieutenant and I stepped into the batteau, I asked Day where the Black Snake was? he replied, "she had gone out of the river the night before, and went over the sand bar last night, did you not see her? I warrant you went within eight rods of her";

said I did not believe she was gone, as he was one of her crew and would have gone on her; he denied this, and said, "if I did own the property, I would fight until every man was killed before I gave it up"; Day then went away; a man named Rice came up and informed the Lieutenant where the Black Snake lay; we rowed the Fly up the river and turning a small bend of the beach, came to where the Black Snake lay; one end of her was on shore and fastened to some bushes; Mudget was standing on the beach a few feet from her with a gun on his shoulder; he called to us not to land; told him we were in a free country and had a right to land where we pleased; ran the Fly immediately along side, between the Black Snake and the shore; as we ran in Mudget retreated, but kept threatening and said, "do not lay hands on the boat, I swear by God, I will blow the first man's brains out who lays hands on her;" the Lieutenant said, "I have orders to take her; she is forfeited and I shall take her"; as we stepped into the Black Snake Mudget stepped round some small trees, and as I looked up I saw Mott with the large gun resting in the crotch of a small tree pointing over the Black Snake where the Lieutenant and I were; Mudget came to the left side of Mott and they talked. The Lieutenant asked them where the sails, oars and rudder were. They said they did not know—the Lieutenant said, "boys, go and see if you cannot find them." Some of our men went to search; they could not find the oars, but found the sails and brought them on board; as we were getting the sails on

board Mudget came to the bank and cried, "come on boys, parade yourselves, you are all cowards, they are going to carry the boat off"; saw two or three men with guns come from the weeds; prisoner Dean was one of them; the Lieutenant directed me to take four oars from the Fly and put them on board the Black Snake, which I did; some one of our men then cut or unfastened the painter; Mudget then cried out again, "come on boys, are you cowards? they are going to take the boat off"; saw two more armed men come from the weeds; went with six men on board the Black Snake; the lieutenant with two men remained on the Fly; we pushed the boats off; at this time Ledgeard came to the bank and called in a methodist's tone of voice, "Lieutenant, prepare to meet your God, your blood shall be spilt before you get out of the river," and more to the same purpose; when we came against Joy's landing, we could see our four men walking with four or five of the smugglers who then threatened the Lieutenant and said he should not go out of the river alive; one of them said, "that man with the red facings is a good mark to shoot at, and I will have his heart's blood"; the Lieutenant told them, if they wished to fire, he was a good mark; the Lieutenant asked the men on shore if they had not rather ride than walk, and he ordered the Fly on shore to receive them; Mr. Rice requested to be carried over the river, and he and the four men got into the Fly; we then had seven in each boat, besides Rice; before we landed there was one gun fired; the ball struck between

the boats; just as the boat struck the shore there was another gun fired; the ball struck the Fly in the stern; went through and passed about six inches from the Lieutenant's legs; there were then several guns fired at the Black Snake, the balls struck the water near her; the Lieutenant ordered Ellis Drake to take the helm; another gun was fired and I heard the Lieutenant say, "they have killed Drake"; saw Drake sinking down and his hat fall overboard; when I saw that Drake was killed I took up my gun and was about to fire; the Lieutenant said, "do not fire; row to the shore"; I landed with the Snake on the south shore, about fifteen rods below where Drake was killed; guns were fired while we were crossing; while the Lieutenant was landing, Capt. Ormsby came to the bank and said, "Why do you not land and seize these men who are violating the laws of their country?" We all then went up the bank and walked a few paces in the road up the river; soon saw the smoke and heard the large gun fired; was on the right of the Lieutenant; saw a man run in the road up the river from where the large gun was fired; drew up my gun to fire at him, but the Lieutenant said, "don't fire, take hold of my hand, I am wounded"; I laid my gun down and took the Lieutenant's gun; he was wounded through the left arm and a ball went through his hat and wounded him in the forehead; saw the blood run down his face; turned my eyes and saw Asa Marsh on the ground bleeding, and some one said, they have killed Marsh; he lay six or

eight feet from me; soon after I saw Capt. Ormsby lying dead; heard no other gun fired but the large gun after I came on shore; was sent after a physician; I returned with Dr. Cole; went where the dead bodies were and saw David Sheffield and prisoner there; I said here are some of the smugglers and ordered my men to apprehend them; some of the inhabitants said, we must take care of the dead men; others said is there a magistrate here? I said, I have the power to apprehend them and I wish all of you to assist me; I then left them and went to Joy's house, and on my return found they had apprehended Day, Sheffield and Dean, the prisoner; soon after I saw David Russell, Esq., who told me he was a magistrate and that the civil power would take care of them, but wished I could assist in guarding the prisoners, and said they must be collected into a room and kept until warrants could be made out and a Court of Inquest sit; soon after the State's Attorney came and the prisoners were taken away.

*Cross-examined.* Never understood that there was any bounty offered for taking the Black Snake; had heard that the law gave something, but never expected any reward for doing my duty.

*James Hayes.* Was a soldier under Lieutenant Farrington; when we came to the Black Snake Mudget stood by her on the bank and told us not to land at the peril of our lives; the Lieutenant said he had orders to take the boat—and some one of our company said this is a free country and we have a right to land where we please; the Lieu-

tenant and Sergeant went on board the Black Snake and I went also; Mudget made a motion with his gun as if he intended to fire at us, and again bid us stand off at our peril, for he would blow the first man's brains out who puts his hands on the boat; the Lieutenant ordered us to go on shore and look after the oars and sails; heard Mudget say to the Lieutenant, "we are both men of honor, you are a Lieutenant, I am a Major, let us fight a duel and save the lives of our men, and then added, I will lay your honor low and have your heart's blood before you get out of the river"; the Lieutenant ordered Sergeant Johnson to take six oars out of the Fly, and to take six men and go on board the Black Snake; cut the painter and shoved the Black Snake off; then went on board the Fly; the Lieutenant sent four men on shore and ordered them to go down the river; when we came to the opening just below Joy's we could see our men, the smugglers were with them; they threatened the Lieutenant to kill him; he said, "don't kill my men, if you want to kill, kill me, I am a mark for you"; we rowed down 60 to 80 rods and then took in our four men; when we were near the north shore a gun was fired; then some more at the Snake and some at the Fly; the third or fourth firing killed Drake; when they were fired I took up my gun to fire but I could see no one to fire at; when we landed I and several others waited until the Lieutenant came up; Day and Capt. Ormsby came to us; Day said, "I am innocent, I have not fired a gun"; Ormsby said those who

had fired at us were in the bushes and we had better surround and take them as soon as possible; when I first saw Day I cocked my gun and snapped it at him; but it did not go off; Capt. Ormsby said Day appeared to be a friend, and Day said he was innocent and so I desisted; recollect what Day had said when he came down the river with Mudget, that if we went up the river we should see something more terrible than the Black Snake; the Lieutenant soon came up and asked for a cartridge to prime his gun, and said, "follow me, we will soon see where they are"; saw Mott come across the road and bring this large gun now in court, and lay it on the corner of the fence and fire; saw Mudget bring a gun to his face and point it at us; cannot say he fired; my attention was drawn to the great gun; told the Lieutenant they were going to fire; when the great gun was discharged the Lieutenant turned partly round; asked him if he was killed; he said I am wounded; saw Marsh fall; he gasped for breath once or twice, but could not speak and instantly died; did not see Mott after this; it appeared to me he retreated in the road up the river; the Lieutenant was shot through the left arm just above the elbow; a buck shot struck his right shoulder and a ball went through the fore part of his hat and wounded him in the forehead; Marsh had two balls through his breast.

*Alexander Walker.* Was a soldier under Lieutenant Farrington at the line; we took the Black Snake; was one of the four men he ordered to proceed down the river on the south

shore; we walked from where the Black Snake lay to near half mile below Joy's; Mudget, D. Sheffield, Ledgeard and one man more, I did not know, walked with us as far as Joy's, when they went before us; Mudget told us that if the Lieutenant proceeded down the river he would take his heart's blood; that he would not hurt the soldiers unless they stood by the Lieutenant, but if they did, there would be more than three gallons of blood spilt; that the soldiers would all be killed, for they had thirty armed men at the mouth of the river; when we came to the butternut I saw prisoner Dean with a gun; we went on the Fly at the same time with Rice, we were crossing to land him when the firing began; we were near the north shore when the first gun was fired, Rice landed and pushed the boat off; the third gun that was fired at the Fly killed Drake; there were two balls through Drake's head near together; he died without speaking a word; before he was shot he raised his gun to fire, but the Lieutenant said don't fire, they are only attempting to scare us; after he was killed a ball struck the oar of one of our soldiers and then we had but one oar left, which the Lieutenant took and rowed the boat ashore; the Lieutenant said it was no use for us to be standing up and ordered us to lay down in the bottom of the boat, for he could row and he had rather take the risk himself than his men; we landed and went up the bank; at first I did not see anyone, but when we proceeded on the road a little way I saw a man with a small arm pointed towards us, he fired I suppose at the same

time with the great gun, but so near I heard but one report; thought he pointed at the Lieutenant who was just before me; I stepped a little out of the way; saw Marsh fall; he stood not far from the Lieutenant or me, next to the river, a little out of the path; saw the Lieutenant was wounded in his arm; he took off his hat and the ball fell out of it; saw the smoke from Mudget's gun when he fired.

*Benjamin Johnson.* Was one of Lieutenant's soldiers; when we came to where the Black Snake lay, Mudget stood by the side of her and ordered us not to land; the Lieutenant or Sergeant said we are in a free country and may land where we please; the Lieutenant and Sergeant stepped on board; saw the prisoner Dean near where the Black Snake lay, as we landed to go after the sails, one of the men said to the lieutenant, "you damned red coated rascal, I will have your heart's blood before you go out of the river; you are a man of honor but I will lay your honor low." We took our four men on board with Mr. Rice and crossed the river in the Fly; the first gun was fired, the ball struck between the boats, the second ball struck between the Lieutenant's legs; the third shot that was fired at our boat killed Drake. I saw a man come up on the bank and point his gun at us; he seemed not to like the place; he went to another and pointed his gun at us again; he then removed to a third place, pointed his gun at us and fired; the ball split my oar and knocked it overboard; have no doubt that man at the bar was the man who fired at me; when the great gun was



fired saw Captain Ormsby fall; as he lay on the ground he said, "Lord, have mercy upon me; I am a dead man!" When we went to Joy's to see the prisoners, I pointed to Dean and said, that is the man who fired at me.

*Peter Dils.* Laid out Captain Ormsby; washed the corpse and examined the wounds; one ball went into the pit of his stomach but did not come out at his back; the second ball went through his right breast and came out under his shoulder blade, the third struck him in the lower part of his belly and lodged against the skin of his back, the fourth struck him in the upper part of his right thigh and went through his hip bone, another cut the cords of his right arm, and left a black mark on the skin of his side.

*Elkinah Perkins.* Was one of the crew of the Black Snake, against whom the Grand Jury found no bill of indictment; about an hour before day, Monday morning, first of August, Mudget came to my house on Hogg island, about five miles this side of Canada line, and invited me to go along with them in the Black Snake; went down to the boat at my landing; Mudget, Mott, Pease, Slocum Clark, William Nokes and the prisoner were in the boat; they had two gallons of rum with them, we rowed on to Martin's bay on the North Hero, and stopped at Peter Martin's house; this was about sunrise; we stayed there until some time in the afternoon; we then started on towards Richard Mott's; Mott spoke of getting the blunderbus; said he meant to have it placed on the bow of the boat, and he would give them one rake

if they attacked him; in the evening we came to Richard Mott's on the sand bar, Mudget and Mott went in to get the large gun; Mott brought it out and said he had bought it, and gave fifteen or sixteen dollars for it; he then laid it on the bow of the boat; we arrived in Onion River about sunrise; we had besides the great gun, nine small ones; we got up to Joy's a little before noon; Mudget ordered us to take the guns to the house and discharge them; we fired into a stump to save the balls; a mark was made on the stump and we fired at it from about eight rods' distance; David Sheffield was the only one who hit the mark; Mudget ordered us all to clean the guns, oil the locks and put in new flints; Mudget went for a load for the boat; understood to be pot ash, by the talk; when he came back he brought provisions and some powder; about a pound in paper, and some lead and pewter; we cut slugs out of the pewter; Nokes loaded the guns and he and Mudget loaded the large gun; they put as much powder into it as I could hold in my hand twice; news was brought that the revenue cutter was coming; this was after sun-down Tuesday evening, but before dark; soon after dark two men came down to us and told us they could not load the boat as the revenue boat was coming to take her; we showed them the great gun, and one of them said he would give us ten gallons of rum if we would go down the river and destroy her; said I did not think it right to murder folks and so said Day; the man did not reply, but took Mudget on one side and talked with him alone and then went



off; after dark Hall's batteau arrived with him and two other men; one was Cleveland, who used to be a soldier at the lines, the other I did not know; Hall went to Pearl's barn with us to go to sleep; Mott and Day were asleep on the floor; the great gun was in the barn; on Wednesday morning went with Mott into the house; he told me he had been up all night running balls; he had some in his pocket; Ledgerd joined us in the morning; he said he had come up the river in a skiff before day, and had been to Burlington to pay some money; told Mudget the revenue cutter was coming up the river and that he had better take care of his boat; the word then was "take arms;" we all went and carried the guns with us to the butternut trees—large gun and all; it was proposed that Mott and David Sheffield should go and see where the revenue boat was; they went over to the north side of the river and were gone two hours. Mott came over in Hall's batteau and said the revenue boat was close at hand; then Mudget, Nokes and Clark went to spy down the south side and returned and said they were very near; Day and others then went and the arms were then all carried to where the Snake lay; prisoner Dean carried the big gun and I gave Mott the ramrod over the fence; went up to where the Black Snake lay and got behind a stump; the revenue boat came up and said they must have the boat; Ledgerd challenged the Lieutenant out to fight; what the Lieutenant said I could not hear, as he spoke lower, but I heard Ledgerd say, "I will have your heart's blood

before you leave the river;" the Snake's men went down the river after she was taken, I was by Joy's house when I heard the first gun fired, and I ran down the river; met David Sheffield in the road opposite where Drake was killed; he told me I was a coward; saw him then rise the bank and draw his gun up and take as deliberate aim as if he was going to fire at a duck; he fired, and then said, "I took good aim;" there were then three or four guns fired and then the big gun was fired; before the big gun was fired Mudget run up and said, for God's sake, fire no more, there are men or a man killed; thought he said men; he then went towards where the boats landed; he had no gun in his hands; don't think Mudget had time to go back to where the great gun was before it was fired; met Mott with the big gun on his shoulder; I said, "Mott, have you fired that gun?" he said, "yes;" I said, "you are not going to fire it again;" he replied, "yes, I would if I had the ramrod, but I left it where the Snake lay;" he threw the gun off from his shoulder and went towards Joy's; met Captain Pease; he told me he had not been down where the firing was; before the firing, Day said, "if we fire at and kill any of these men it will be murder," and so said Pease; he said it would be murder; we left our guns leaning against some trees and returned to the butternuts without them; Nokes said, where are your guns, you are traitors; we went after our guns and set them with the rest against the butternut trees, and we never took them afterwards. Don't

think the prisoner owned any part of the Black Snake; it was said Mudgett owned the boat; that he purchased her of the

Taylor for \$200, and that Mott was to own half of her after this trip.

September 5.

#### THE WITNESSES FOR THE DEFENSE.

*Nathan B. Haswell.* Heard one of the soldiers of the revenue boat say they were to have a bounty of one hundred dollars; am Deputy Collector; Johnson, the Sergeant, applied to me for a certificate or receipt for the Black Snake, to get the bounty. I assisted in apprehending the prisoner, who was then within 10, 15 or 20 rods of where Marsh and Ormsby lay; asked him how he came there; he said, "upon his feet;" asked what authority I had to apprehend him; saw him struggle with Rice; the prisoner was then in the edge of the bushes.

*David Russell.* Told the Sergeant in a jesting way that as he had sworn the revenue boat struck her colors, for he did so at the court of examination, though he has since said he was mistaken, they were not entitled to the bounty; he replied, we kept the boat and are to have the bounty; he did not tell me from whom he expected it, but said they were to have one hundred dollars extra.

*Alexander Walker* (recalled). Have been this morning to examine the ground more particularly; find it was about a quarter of a mile from the upper end of the woods to where the big gun was fired; Mr. Lathrop paced the ground from where the great gun was fired and found it to be six instead of three rods, but it was in plain sight.

*Stephen Pearl Lathrop* (recalled). I went this morning with Mr. Turner, the prisoner's Counsel, and at his request, to view the ground where the affair happened; found the corner of the fence upon which Mott rested the large gun when he fired, and the place where I suppose I stood; have paced and find it to be near six, instead of three rods from Mott, but I was in plain sight of him; the prisoner stood partly in the trench, about three rods from me, quartering, so that he was about one rod further from Mott than I was when he hollowed to him to fire; prisoner had a dark short coat on; cannot be positive whether Dean had a gun or not; am positive it was the prisoner Dean who told Mott to fire.

*Charles Adams* (called).

*The Prisoner's Counsel.* We introduce this witness to impeach the testimony of Stephen Pearl Lathrop; we shall show that before the Court of Examination, Lathrop swore very differently as to the distances he stood from Mott and Dean.

The COURT. Lathrop has testified on this very trial that he stood about three rods from Mott when he discharged the large gun, but he has this morning been to inspect the spot and rectified his memory by actual admeasurements; it turns out in evidence that he went to inspect the spot, by the procurement and in company with the

prisoner's Counsel, and is now produced to testify in the defense. The COURT doubts the propriety of any attempt to im-

peach his testimony in this particular, by showing that he swore differently before the Court of Inquiry.

#### WITNESSES IN REBUTTAL

*Asa Rice.* Assisted in taking Dean; he was standing by the dead bodies; Mr. Haswell said, take him; Dean wanted to know by what authority; I went to lay hands on him; he closed with me; took the lock of me and threw me down; he soon after said he would go with others; he was led off to Joy's; when we came there he was tied, but he contrived to get loose; jumped out of the window and ran towards the woods; was one of those who ran after him; when I came up with him he kicked me; we brought him back.

*James White, Jr.* Was present when the great gun was fired; after they had fired I saw them take off their hats and huzza; at the same time the great gun was fired; saw a man stand on the edge of the bushes; he presented his gun at us and fired; was one of the soldiers; this man had a white hat on; saw him afterwards and know it was Mudget.

*Lieutenant Farrington.* Was an officer in the militia of the state, detached to keep guard on Windmill Point; news came that the Black Snake, a boat which had frequently gone into Canada with pot ashes, had passed up the lake and we understood that she was not sufficiently armed, and therefore it was concluded she might be taken and no lives lost; was commanded to detach a Sergeant and twelve men and go after her in the revenue boat and take

her. My orders were when I came within reach of her to hoist my flag, then to fire before her bow, then behind her stern and if she did not surrender, to level at her. We proceeded up the lake as the other witnesses have related; I confirm Sergeant Johnson's testimony as to the conversation with Day; we rowed up to where the Black Snake lay, there was a man stood by her with a gun, who threatened to shoot the first man who came on board; I stepped on board with the Sergeant and took the boat; there was much threatening language, as has been testified by other witnesses, and a number of men appeared armed to oppose us, but I thought it most prudent to take the boat without regarding them, or at least to wait until they fired first; after I had got possession of the boat, at first thought it my duty to go on shore and apprehend the men who were in arms, but was determined from the first setting out, to shed no blood if it could possibly be avoided and so desisted; ordered my men to go and search for the oars and sails; one sail I believe, only, was found and brought on board the Black Snake; she was then unloosened from the shore; ordered Sergeant Johnson and six men with six oars from the Fly to go on board; ordered four men to go on the south shore as a flanking party and went on board the Fly myself with two

men and two oars and we proceeded down the river; when we came opposite Joy's landing we could see our men and some of the Black Snake's crew, who used much threatening and abusive language; a quarter of a mile below I took four men on board with Mr. Rice, who I engaged to carry across the river; as we came near the north shore the first gun was fired; the ball struck between the boats; some one of my men raised his gun; I ordered him not to fire; a ball from the second gun came through the stern of the Fly and within a few inches of my legs; then found they were in earnest and resolved to go to the south shore; we landed Rice and pushed off the Fly; when a little distance from the shore and several balls had been fired at the Snake, the gun was fired which killed Drake; as we were crossing the river a ball struck the oar held by Benjamin Johnson and it went overboard; as the firing did not cease, I ordered my men to lay down in

the bottom of the boat, whilst I rowed with one oar; when we arrived on shore we went up the bank, marched a few rods in the road, and the large gun was fired, which killed Captain Ormsby and Asa Marsh. The flag came down immediately upon Ellis Drake's being killed, whether by his falling against it, or some other way, I cannot tell, but I did not strike it or order it to be struck; never heard of any bounty offered by Dr. Penniman or Captain Pratt, but believe there was some talk among the soldiers; some said twenty-five, some fifty, and some one hundred dollars; when I lay sick in Burlington heard that some of my men saw a man who fired at the boat; on my return to my company, about three weeks after the affair, Benjamin Johnson told me that he saw a man present a gun at him three times, the last time he fired and hit his oar; that when he came on shore he picked out the man, and his name was Dean.

*Bates Turner* opened and *Amos March* closed the prisoner's defense; and *C. P. Vanness* closed for the state.

After the JUDGES had severally charged, the *Jury* were committed to the charge of an officer, sworn according to the statute; and the COURT had a recess. About two o'clock, in the morning, the *Jury* returned into court and were called and numbered.

The *Clerk*. Gentlemen of the Jury, are you agreed in your verdict? The *Jury*. Agreed.

The *Clerk*. Who shall say for you? The *Jury*. Our Foreman.

The *Clerk*. Who is your Foreman? The *Jury*. John Brown.

The *Clerk*. Mr. Foreman, look upon the prisoner at the bar. Cyrus B. Dean, look at the Foreman of the Jury. How say you, Mr. Foreman, is the prisoner at the bar guilty of the charges in the indictment, or not guilty? The Foreman. GUILTY.

*September 9.*

A motion in arrest of judgment was argued by the *Prisoner's Counsel*, but it was overruled by the Court, and the *Prisoner* was sentenced to be hanged on Friday, October 28, 1808.

## THE TRIAL OF JARED W. BELL, FOR BLAS- PHEMY, NEW YORK CITY, 1821.

### THE NARRATIVE.

In a political discussion over the Hartford Convention,<sup>1</sup> in a corner grocery store in New York City, one night, the disputants became quite angry and much violent language was used. Time did not allay the bad feeling which the dispute had caused, and not long after this the proprietor and one of the crowd had a personal encounter, which resulted in the former laying a charge with the police for assault and battery. He did not prosecute it, however, but later had one of the men arrested for blasphemy on the night of the grocery store discussion. The words charged were most profane, but the jury evidently considered the prosecution a political one, and promptly acquitted the prisoner.

### THE TRIAL.<sup>2</sup>

*In the Court of General Sessions of New York City, June, 1821.*

HON. RICHARD RIKER,<sup>3</sup> *Recorder.*

MALTBIE GELSTON, }  
JOHN P. ANTHONY, } *Aldermen.*

The defendant was indicted for blasphemy.

The indictment alleged that Jared W. Bell, printer, not having the fear of God before his eyes, but being moved and se-

<sup>1</sup> The year 1814 found the Federalist party in New England extremely ill-disposed towards the government. The purchase of Louisiana, the representation of slaves, the admission of new states in the south and west, the war of 1812, and the embargo were extremely unpopular, and culminated in the Massachusetts legislature calling a convention to meet at Hartford in December. Twenty-six dele-

duced by the instigation of the Devil, contriving and intending to scandalize and vilify the Christian religion, as received and publicly professed in this state, and to blaspheme God and our Lord Jesus Christ, on the first day of April, 1821, at the city and within the county of New York, unlawfully, wickedly and blasphemously, in the presence and hearing of divers citizens of this state, spoke and pronounced, and with a loud voice published, these profane and blasphemous words following, that is to say: "God Almighty was a fool"—"Jesus Christ was a fool"—to the great dishonor of Almighty God, in contempt and disgrace of the Christian religion, to the evil example of all others in the like case offending, and against the peace, etc., etc.

*Hugh Maxwell*,<sup>4</sup> for the People.

*W. M. Price* and *Mr. Fay*,<sup>5</sup> for the Prisoner.

#### THE EVIDENCE.

*David McKinney.* Am a grocer. My store is on the corner of Catherine and Henry streets, in this city. On the evening of April first the prisoner was in my store. My son Samuel, George Skelding and John E. Parker, and some other people, were also present. A violent dispute took place between Bell and the others about the Hartford

convention. Some one praised the convention when Bell shouted out the words set out in the indictment, immediately adding, "for creating such men as composed the Hartford Convention." Some advocated the object and proceedings of that body, and Bell took the contrary side.

*Samuel T. McKinney.* Am the son of the last witness and heard

gates responded from Massachusetts, Connecticut, Rhode Island, Vermont and sat for three weeks with closed doors. This secrecy made the public think that treason was being hatched and many believed that the New England states were about to secede and that the convention was framing a new constitution. All it did was to pass resolutions and adjourn. But its work came to naught. The news of peace that soon reached America rendered the whole proceeding ridiculous and the members that composed the convention, as well as the party they represented, thus brought on themselves an odium from which they never recovered. 4 McMaster Hist. U. S. 246, 3 Elson 55.

<sup>2</sup> See New York City Hall Recorder. See 1 Am. St. Tr. 61.

<sup>3</sup> See 1 Am. St. Tr. 361.

<sup>4</sup> See 1 Am. St. Tr. 62.

<sup>5</sup> See 1 Am. St. Tr. 718.



the prisoner say the words my father has just sworn to. It was in our store on the night of April first. About a month before this dispute happened prisoner was at the store using very profane language, by taking the name of our Saviour in vain. Father interfered, and asked him why he made use of such expressions—in answer to which he said, "What was Jesus Christ? He was nothing but a fool."

*Cross-examined.* Some time after this a difficulty occurred between prisoner and father, the consequence of which was that he complained against Bell to the police for an assault and battery; and applied to Mr. Shelton, an attorney, who advised that this prosecution could be maintained. Can't give any reason why we did not prosecute Bell for the assault before the first of April matter.

*John E. Parker.* Was present at the dispute when David McKinney advocated the Hartford Convention, and Bell, on the other side of the question, said, that it was a disgrace to the country, to human nature, and almost to God himself. Heard the whole that was said, and did not hear the words imputed to defendant.

*George Skelding.* Was present at the dispute, and heard the defendant say, in relation to the Hartford Convention men, that it was a disgrace to God Almighty to let such men live.

*Mr. Price* (to the jury). I urge that the testimony of the prosecutors in relation to the blasphemous words alleged to have been uttered by the defendant concerning our Savior ought to be laid entirely out of view: that the testimony of the McKinnys was not entitled to belief. He referred to the

*Seymour Carpenter.* Defendant had on other occasions made use of other blasphemous language.

*Mr. Price* objected.

*Mr. Maxwell.* I offer this as testimony to show the *quo animo*, and to support the testimony of the prosecutors.

*Mr. Price* insisted that the public prosecutor ought to be confined to the specific offense laid in the indictment.

The RECORDER thought that this was one of the cases in which accumulative testimony ought not to be admitted.

*Mr. Carpenter.* Defendant uttered similar words laid in the indictment at another time in my presence.

*Mr. Price* objected.

*Mr. Maxwell* contended that he was not confined to the time laid in the indictment.

The RECORDER. The evidence is admissible.

*William S. Cordell, Joseph Hoxie, William M. Willett, John Utt, and Job G. Williams* testified that they had known the defendant several years; that his character was and is fair. *Samuel Woodworth* and *Moses T. Scott* testified that he had been in the habit of attending with his family the church of Mr. Mitchell in this city; and they had heard him often express his conviction of the truth of the doctrine of universal salvation.

case, *The People v. Ruggles*, 8 Johns 290, and admitted that the decision of the Supreme Court in that case was the law of the land.

The RECORDER charged the jury, that although by the constitution every man in this country had a right to entertain any religious opinion, and all sects had free toleration in their respective modes of worship; though the Unitarian, Jew, Mahometan, and Pagan, remained here free from persecution, yet it was contrary to the principles of the common law for any man to revile the religion generally prevailing here, or its author; or to impeach or call in question the attributes of the Deity. While, on the one hand, we say to the Unitarians, Jews, Mahometans, and Pagans, enjoy your own religious notions free from restraint, so on the other, we say, and such is the language of the law, revile not the religion which we profess, or its author. It is from religion that oaths in courts of justice derive their efficacy; and to undermine the religious opinions of men would deprive us of the security we place upon oaths in judicial proceedings and others, and would finally operate to the subversion of civil society.

The case of *Ruggles* has settled the law on the subject; the facts are for the jury, if they believe the words laid in the indictment to have been uttered by the defendant, it would be their duty to convict him. But considering the testimony adduced on his behalf, in contradiction of the testimony of the prosecutors—considering the testimony of his good character, and his peculiar religious opinion, it was hardly possible that he could have uttered the words laid in the indictment. If the jury should believe that he did not, and that the prosecution originated from mistake or malice, it would be their duty to acquit him.

The *Jury* returned a verdict of *Not Guilty*, and the *Prisoner* was discharged.

THE TRIAL OF NOAH CHERRY, ROBERT  
THOMPSON AND HARRIS ATKINSON  
FOR THE MURDER OF APPIE JANE  
WORLEY, GOLDSBORO, NORTH  
CAROLINA, 1873.

THE NARRATIVE.

In one of the counties of Georgia, in the spring of 1873, there lived in a sparsely settled land, inhabited mostly by negroes who had lately been freed, a poor white man, James Worley, his wife and several small children. One morning a negro named Cherry, who occasionally worked for Worley, came to a neighbor and said: "I have seen the greatest sight I ever saw, Worley and his wife are murdered and I have come to tell you." The neighbor and others hastened to the place and found both the man and the woman dead with many wounds, apparently done with an axe. The surroundings showed evidence of a long struggle. Several negroes were arrested and before long one of them, Jerry Cox, confessed to having witnessed the killing. He was used as a witness, and largely on his testimony (though he was no doubt as guilty as the others), Cherry, Thompson and Atkinson were convicted and hanged, a great concourse of people from the adjoining country attending the execution.

THE TRIAL.<sup>1</sup>

*In the Superior Court of Wayne County, Goldsboro, North Carolina, April, 1873.*

HON. JOHN J. KERR,<sup>2</sup> *Judge.*

*April 23.*

The prisoners, three negroes, Noah Cherry, Robert Thompson and Harris Atkinson, had been indicted by the Grand

<sup>1</sup> *Bibliography.* •"The Murder of the Worley Family in Wayne County, North Carolina, and the Arrest, Trial and Execution of

Jury for the murder of James Worley and also for the murder of Appie Jane Worley, his wife.<sup>3</sup> They were tried today on the second indictment. The bills were found solely upon the testimony of Jerry Cox, a negro, and an accomplice, but whom, for lack of other evidence, the state used as its witness.

*Lon. C. Moore*, District Solicitor, *W. T. Dortch*,<sup>4</sup> and *William E. Clarke*, for the State.

*Swift Galloway*, *John D. Kerr* and *G. T. Wassom*, for the Prisoners.<sup>5</sup>

The COURT (to the prisoners). Hold up your right hands.

The indictment for the murder of Mrs. Worley was read by the *Clerk*, and the three prisoners pleaded *Not Guilty*. The names of the *Jurors* summoned were then placed in a hat.

The *Clerk*. These good men that you shall now hear called are to pass between the state and you upon your life and

Noah Cherry, Robert Thompson, and Harris Atkinson. By Julius A. Bonitz, Editor of the Goldsboro (N. C.) Messenger. Containing the Shocking Details of the Atrocious Crime, and Giving a Continuity to the Events which Transpired, from the Discovery of the Bodies to the Final Sentence and Execution of the Murderers, including their Trial, Testimony and the Speeches of Counsel. Goldsboro, N. C., Messenger Power Press Plant. 1878."

<sup>2</sup> KERR, John. (1811-1879.) Born in Pittsylvania County, Va. Educated at home and at Richmond. Read law with Judge Pearson. Member of Congress (North Carolina) 1853-1855. Whig candidate for Governor 1854, but defeated by Governor Reid. Representative (Caswell County) State Legislature 1858-1860. During the Civil war was employed in his professional and agricultural pursuits, and when it closed he suffered much tribulation and indignity at the hands of those who were attempting to reconstruct the state government. Died in Reidsville, N. C.

<sup>3</sup> The reporter notes that the indictments were "in due form and with all the legal technicalities and apparently useless repetitions."

<sup>4</sup> DORTCH, William Thoeophilus. (1824-1889.) Born Nash County, N. C. Licensed to practice law 1843. Removed to Goldsboro 1849. Elected to House of Commons from Wayne County 1852, and continuously (except one session) until 1860, when he was elected Speaker of the House. Senator Confederate states. State Senator North Carolina 1878, 1880, and 1882. Chairman Judiciary Committee. President of Senate 1879. Chairman Code Commission 1881.

<sup>5</sup> Thompson and Atkinson, having no counsel, the Court appointed Messrs. Galloway and Kerr to defend them. Wassom, a negro, appeared for Cherry.

death; if, therefore you will challenge them as they come to the book to be sworn, you shall be heard.

The COURT. You have each of you twenty-three challenges without assigning any cause whatever, and as many others as you may have cause for.

A small boy was called to the clerk's desk to draw the names from the hat. The drawing and challenging took over three hours, when the following jurors were chosen: William Moor-  
ing, Cullin Flowers, A. J. Brown, Thomas Sutton, Giles Kornegay, George H. Grantham, Mathew Jones, Jr., William J. Forehand, Howell Garriss, J. Wesley Talton, N. G. Holland and Jackson Pate. All of the jurors were white.

The *Clerk* (to the jury). You shall well and truly try and deliverance make between the state and the prisoners at the bar, whom you shall have in your charge, and a true verdict render according to the evidence, so help you God. Prisoners, rise, hold up your right hands and look upon the jury. Look upon the prisoners, you that have sworn and hearken to their cause. Upon this indictment which you have heard read, the prisoners have been duly arraigned and they have pleaded not guilty, and for trial they have put themselves upon God and their country, which country you are. So that your charge is to inquire whether they be guilty of this felony whereof they stand indicted or not. If you find them guilty, you shall say so, and if you find them not guilty, you shall say so. Sit together and hear your evidence.

*Mr. Dortch* (to the jury). Gentlemen of the Jury: We are about to enter upon the most important case ever tried in Wayne county, and one of the most important ever tried in the United States. An awful crime has been committed. You will be careful before you render a verdict. The state does not ask a conviction, unless she fully establishes the guilt of these prisoners at the bar. A peaceable citizen, James Worley, has been murdered, and his wife first violated and then murdered. Try and see the transaction in its true light. The evidence will show you that James Worley, his wife and three children lived at the Islands of the Neuse. This is an

extensive tract of low ground, inhabited almost exclusively for years by the colored people, until a short time ago, when Worley moved in there with his family. We think that one motive of the crime was that this locality being a great range for stock, and well timbered, the presence of a white man prevented the depredations of the lawless negroes. The colored people have acted nobly in this matter, and to them is principally due the credit of arresting the murderers. But there are some bad and lawless ones among them as well as among us.

They could not have the same license as before Worley moved down there, and this, we think, was the motive for the murder. But there was another motive. Noah Cherry was infatuated with Worley's wife. About one month before, he had been heard to say he would have her if he had to kill her husband to accomplish his purpose. He said she was a monstrous fine woman, and that her husband was not enough for her. Our main evidence will be that of Jerry Cox.

First. We shall show that on the morning of the day of the murder, Jerry Cox had been working with Noah Cherry. Noah Cherry asked Jerry to meet him at sunset at a certain place. Cox says he thought it was about some staves. On the way Cherry stopped and got his axe from a tree, and they went on to Worley's house. Jerry stopped at the bars. It is a log house eight by twenty feet and has two doors. The back door was closed. As they came up to the bars Harris and Bob met them, coming from an opposite direction. The prisoners lived near each other. Noah Cherry hailed and the three went together into the house. Jerry stopped at the bars some six or seven steps from the door.

The other side will argue that Jerry Cox is a *particeps criminis* and should not be believed; but the law says the evidence is competent and a jury may convict upon the unsupported evidence of an accomplice, provided they are satisfied that he told the truth as to the fact of the killing. It is not necessary that you should be satisfied he tells the truth as to the part he took in it. Each of these three committed a rape upon

as the men who committed the murder, and they did not dare deny it.

Again, Cherry is the first man to discover the dead. About two hours by the sun, he appeared at Arthur Stevens' and said, "I've seen the greatest sight I ever saw, Worley and his wife are murdered and I have come to tell you."

The evidence against Robert Thompson is that Cherry's bloody clothes were found at his house: a bloody hatchet and hoe-helve were also found there. When asked about it, he said he had killed a pig. We will show that he had not killed one that fall. Thompson and Atkinson were not seen about their homes late on Monday afternoon. Then again on Tuesday both came around back of Worley's to see if anything had been found out. Bob meets a man on the road and asks to be hired, says he did a big day's work the day before; he mauled rails at Hunter Hall's. We will show by Hunter Hall that Bob never mauled a rail for him. When told of the murder he said, "I suppose it is an old grudge some one had against him, and that they have packed it off on Cherry. It's nothing much anyhow; it's a small matter; worse things than that have happened; that Worley had been killed for some of his big talk. If Noah Cherry has to hang for that, so will I." Little Tildie Worley, when asked who Harris was, said, "It's old Hare." When sent for by the Coroner, he refused to go. He said he was no witness and did not intend to be. He made the officer read over the summons two or three times. On Tuesday he crossed the river and went around four or five miles to go to a certain house, when by crossing the river direct he could have reached his destination only a mile off. We shall prove that the Sheriff found at his house an axe that had been recently washed. He said, "It was a matter of nothing; if negroes had been killed nothing would have been said about it, but being white folks, they made a big fuss about it."

#### THE WITNESSES FOR THE STATE.

*Jerry Cox* (a mulatto). Heard lumber so he could accomplish Noah Cherry say that he was his ends with his wife. About going to kill Worley about the a month before the murder



Noah had been working at the islands. He had been getting timber there. Worley had made one crop there and prepared for another. Worked with Noah Cherry for about five months. Quit working with him about August 3. Passed Worley's house. Noah had to pass there to go to work. I lived about two miles from there. I saw Worley last on Friday before he was killed, at old General Atkinson's. Never met him again. Noah Cherry told me to meet him at the corner of the fence not far from the house, that evening. About dusk I got there. Saw Noah Cherry coming in haste from the old Toler place. He said let's go down to the islands. Thought he wanted to go to work, because when we got pushed up we went down there at night to work. We went towards Worley's house, and before we got to Worley's about 275 yards from there, Noah got his axe. He pulled it down from out of a tree top. He went farther down and told me he wanted me to cut down a tree he showed me, for pipe staves. He never told me why he wanted to go to Worley's. He had told me before, but I did not believe he was fool enough to do it. I often gave him something to drink. We had a small difficulty, but soon made up; that was last summer. When we got to the bars Noah Cherry hailed, to keep back the dog. Worley came out when we had been there about five minutes. I saw Bob and Harris coming another way, up from the slough side. They came up to us. Bob had an axe and Harris had a stick like

a walking stick. The moon was shining, but it was cloudy. The front door was before the bars about six or seven steps off; there seemed to be but little fire, but right smart blast. They all went into the house and I stayed out. Thought Noah wanted to get fire or trade a little. They wanted me to go in and Worley asked me to go in. We had worked near there for several nights. Heard a lumbering near the fire-place, but could not tell what it was. The fire-place is in the other end of the house and the door is in the middle. The back door was not open. Up to that time had not seen Mrs. Worley. Was not over five or six minutes after they had gone in when I saw Worley run towards the door, and saw Cherry strike him with an axe. Worley was running slow with his head hung down, and a little child could have caught him. Noah struck him again with the axe, and then Bob and Noah finished him around by the chimney. Noah struck him again about the head. Bob struck him with a stick. Saw Bob and Noah then come and they went into the house towards the fire-place. Harris had his hands around Mrs. Worley's neck; in scuffling they had got in front of the door, and I could see them. Harris had not been out of the house at all. Old man Noah passed the first rape, then Bob Thompson and Harris Atkinson the last. They held her down for each other. Noah then came out and went to where Worley was lying. Mrs. Worley came out to the door and he ran up and struck her with the axe. She cried out, "Oh, Lordy!" Harris

house on the evening of the murder, about fifteen minutes after sunset. Noah was looking down and stopped two or three times as if he was undecided what to do, and I heard him groan. The distance from where I first saw Noah to where Jerry Cox says he met him is about half a mile. Do not think Noah saw me. Watched him for some time. Had some turkeys baited down there, and watched to see if he was going towards them. Have worked in timber a great deal. In February oak timber will not stain, as there is no sap in it then. Have seen those clothes before (clothes produced). First saw them at William F. Atkinson's Sunday after the murder. Examined them and the stains were there that day. I see them now. (Here he pointed out the stains upon the pants and shirt.) They are not quite as plain as they were when first brought in. Those are not timber stains. To the best of my knowledge it is blood. Oak will not stain in February, and but little in March when the sap begins to get in. Noah's work is three-quarters of a mile from where I saw him.

*Melvin Atkinson* (colored). Have known Noah for a year and a half. He came to my house in December last. He slept at my house. He left on Monday morning the day of the murder and said he was going into the woods to get staves. Said he would not be back until Saturday night; he was going to work with Bob Thompson and stay with Art. Stevens or with Bob. Monday night met Noah about 250 yards from my house

going towards there. Was with Lewis and Isaac Atkinson. Thought it was about half past ten o'clock in the night, had no watch. Had come home and got up wood and light wood, made fire, ate supper and sat smoking when Lewis and Isaac came in and we talked a long time, and then started to Mrs. Murphy's. When I got back home I found Noah there. Lewis came back with me. Noah had his hands to his face. He wanted me to lend him some meal. He cooked some and ate. He left there about sunrise on Tuesday and went in the same direction. Recognize those clothes as Noah's. Heard Noah say that Worley had a dog. Heard him speak about hogs. Heard him say that Worley had right smart hogs and lots of corn, and the hogs that Worley had Monroe Atkinson ought to have. Have heard Noah speak about Mrs. Worley. He said Mr. Worley was a small man, and he had a pretty large wife.

*John W. Batten* (when witness came on the stand, he had by his side little Tildie Worley. Her appearance within the bar created a profound sensation.)

*Defendant's Counsel* objected to the child's presence on the stand. *Mr. Dortch* stated that the prosecution had no idea of introducing her as a competent witness. The COURT saw no reason why she should not remain at the side of Mr. Batten, being under his protection.

*Batten*. Knew Worley and his wife, am uncle to them by marriage. Went to the scene of the murder in the evening. Could see no tracks as the ground was very hard. Could see the marks

of the dog's claws where he had been in contact with the murderers. Saw Noah Cherry near my house on Monday. Saw these clothes on Monday morning on Noah Cherry. Recognized them by that colored patch like a guano sack. Found bloody sheets at Worley's. Knew that some of their blood was on them. That is a piece of the sheet. (A small piece of the sheet was here produced.) It has been washed and boiled in water and lye. (The jury were then offered for inspection, the clothes of Noah and the piece of sheet, that they might compare the stains on them.) I think the youngest child of the Worleys was about nine months old. Was before the Coroner's jury. Met Noah about three-quarters of a mile from Worley's on Monday. He stopped and talked with me. Am in the habit of looking at men's faces and at pants too when they are uncommon. Never saw him with any pants that were not patched. Those stains might have been there, but I did not see them on Monday when I met him. My wife cut out that piece of sheet in my presence. I carried the sheet home. That is murder blood. That was the largest spot on the sheet. It was redder than that when I carried it to my house. The lye was made of potash and warm water. The whole sheet was washed before the piece was cut out. The way I know is that I did not see any other stain on it. Mrs. Worley's youngest child is about nine months old. The eldest, I think, is between four and five. I do not know the difference between blood that flows

from menstruation and that from the arteries.

*W. D. Price.* Live on the road between Cox's and W. F. Atkinson's. I saw Robert Thompson on Tuesday after the murder, about 11 o'clock. He came to see about a job of ditching for me. Went to Worley's house on Monday. Arthur Stevens came after me and we went down there about 9 o'clock. They had a bad dog. First saw Worley, but the dog got after me and I knocked him down with a fence rail. We went in and brought out the three little children. Atkinson helped Tildie out first and I carried her to the fence to Arthur's wife. Then he brought out the others. Mr. Atkinson carried the baby to Arthur's wife. Inside the house there was some blood on the chairs, and they were turned over. There was also some blood on the hearth, on the table, near the door, and out of doors to where Worley was lying at the southwest corner of the house, on the chimney six or seven feet high, and down to about three feet; a quantity around his head, also near the water pail, and under the bottom sill of the house, and some was spattered to the eaves of the house. Saw the impression of the eye of an axe over the door, as if it had glanced. The ground was hard around the house. Could see signs of a scuffle but could not see a track. There were two marks made with the blade of an axe, and blood on the mark on the ground. Saw mark of an axe eye near Worley. There was a mark on his face, a mark of an edge of an axe dragged from

his face. There were signs as if the dog had scuffled around Worley. Told Bob about the murder at my house. He said, "I am idling away time today. I had a hard day's work yesterday, mauling for Hunter Hall." Hall lives three miles from me. They took Bob up and then they turned him loose, and he came back. Bob said, in speaking to me about the murder, "He had been studying about it and thought it was done by a party who lived a great way off and laid it on old man Noah."

*Cross-examined.* There was no one there when I got there. Noah Cherry was about 150 yards off from the house standing against the fence. Arthur Stevens and others were there. Noah did not come right up; he stopped three panels off, and was standing there seemingly picking a splinter most of the time I was there. Only stayed there about a half an hour. Was not looking at old man Noah all of the time, but pretty often. The sun had not dried the axe-chops in the ground. They appeared to have been made the night before.

*Dr. George Kirby.* Am the Coroner of the county. Arrived at the scene of the murder about 3:30 on Tuesday evening. Saw Worley first, lying near the chimney. A deep wound on the right side of the face, on the neck and on the lower jaw; the skull was mashed in; it was broken in several places. Were wounds on the arms, and a cut in his back. Examined his body. Think the cut came from behind. There were in all, besides bruises, six cuts. The wounds

on the head were made with a club, the eye of an axe, or some blunt instrument. There was blood on the house, as though it had spattered up from his wounds; there was blood on the chimney a little higher than a man's head, and there were marks of a dog's claws, and prints of an eye of an axe near Worley. Those near Mrs. Worley were made with the blade of an axe. Mrs. Worley was lying at the door, as though she had been pulled out or knocked out of the door. Saw a wound on her face made with some sort of a blunt instrument. The cut was a deep one. The skull was crushed in as though done with the eye of an axe or stick or some blunt instrument. There were four fatal wounds on the wife. The crushing of the skull would kill her. Saw blood on the water shelf, and the under side of the sill. At the fire-place there was a considerable pool of blood and there was blood on the table as though a battle had come off there. There were bruises on the throat of Mrs. Worley as though made with a man's hand. I examined the child, Tildie Worley, could not at first make out what she said. Called Mr. Batten and asked him to take her aside and see if he could understand her. Afterwards asked her who killed her papa. Noah Cherry was about three steps off, near enough to hear her. She said, "Uncle Noah, and there he is now." She pointed to him. He made no reply. Before the close of the inquest, the three prisoners were arraigned so that the light would fall full upon them. She was about six feet

from them. I pointed out Harris and asked her if she knew who that was? She said, "No!" I pointed to Uncle Noah and said, "Do you know who that is? Do you want to go and sit on Uncle Noah's lap?" She replied, "Noah killed my papa." Then asked her who helped him and she said, "Old Hare helped him." I asked her who she meant by old Hare, and she answered, "Old Hare, that lives down by the slough." Pointed out Thompson and asked her if she knew who that was. She smiled and said, "I believe it's Mose."

*The Counsel for the Defendants* objected to the introduction of her statements. The COURT ruled, that while her statements were inadmissible as testimony for the jury to consider, yet it was competent for the State to show the effect of these statements upon the prisoners, when made in their presence, and that their conduct at the time was evidence.

*Arthur Stevens* (colored). Am living near the Worley place at Cox's ferry bridge. Was living there at the time of the murder. Heard of it the next morning after the murder. The sun was about two hours high. Heard Noah in my house when I came in. He said he left things in bad condition at Worley's house. That in coming by there that morning the dog hailed him fifty yards from the house. He called out, and then got over the fence and saw Mrs. Worley lying at the door. He then went around by the stables and saw Mr. Worley. Noah said he thought some one else should know it and came to tell me.

Got on my horse and went down with my boys and saw both lying there. I sent the boys back and then went for Mr. Atkinson, Fail Price and others. Heard Noah say that he saw Talton the evening of the murder, between Worley's and the road. Noah said he went from there to Alvin Stallings, and then went on home.

*Jesse Pearce*. Live five miles from Worley's house. I heard Noah Cherry say he did see Mr. Talton. This was on Tuesday evening.

*James Richardson*. Once heard Noah Cherry say that Worley was taking the sap that he had split off of staves, and he told him not to do it, but he would not stop. Said he had a notion to strike him, but concluded not to.

*Stephen L. Wilson*. Was one of the Coroner's jury. Found a bloody stick on Sunday evening under the barn about sixty feet from the house. It was a large oak stick. One end was larger than the other, and it was bloody.

*Dr. J. B. Kennedy*. Examined the bodies at the request of the Coroner. It was a bright moon-light night. I knew Mrs. Worley well; have known her for four or five years. She was a fine specimen of a country woman. She was five feet six inches high; powerful but not over fleshy, being all muscle and bone. She was raised to work in the field. Examined her body under her clothes. Wm. Richardson was present. The woman was laid out in the clothes she was killed in. Made an examination of the vagina, for the purpose of discovering if there

were any laceration of the parts but found none. Discovered that her monthly period was on her. I found on the right thigh prints of bloody fingers; the indentation of the ball of the fingers, and some bloody nail marks. There was a bruise on her right leg below the knee as though she had struck it against something. Am satisfied that she was choked with the left hand, as there were four distinct marks on the right side of her throat, and one as distinct thumb mark on the left side. There was the print of every finger, and a little scratch on the left side where the thumb nail had entered the flesh. There was a cut two inches long on the right side of the head, and the back of the head was crushed so that I could work the bones about. Saw a bloody stick there.

*Cross-examined.* The mark on the thigh could not have been made from the outside. The thumb-nail was through the skin where they had choked her.

*B. V. Smith.* Took that shirt and those pantaloons out of the tub of lye at Robt. Thompson's house; W. H. Game and his brother were with me. Asked Bob if Noah had some clothes there. He said, "Yes, some old ones," but he did not know where they were. The lye was very strong. Never heard Noah own the clothes. These are the same clothes I found. We found a hoe-helve with some blood upon it, and a hatchet also. The hatchet looked greasy and dirty. Can't say that it had blood on it. The blood on the hoe was about in splotches, and was about a half a foot from the

hoe. Arrived at Harris Atkinson's and woke him up about sunrise. Found him in bed. Told him I had come after him as a witness about the murder. John Oliver and William Langly were with me. He said he did not know anything about it and wasn't going to be a witness. Took out my order of arrest and read it to him. He said, "Well I can go, but I don't know anything about it." He went out to speak to his wife, and asked me to read the order again. Took the clothes to the inquest.

*Cross-examined.* Bob said there were some clothes there and sent off after the woman. Did not arrest Bob at all. When the woman came she started to wring out the clothes. Told her to hold on; that I could take care of the clothes as they were.

*W. C. Game.* Went to arrest Bob Thompson; told him I wanted him to go with me to Mr. Atkinson's. He asked me to read the summons, and it was read to him. He said he did not have one old shirt and a pair of pants belonging to Noah Cherry. Asked him if he knew where they were, and he said he did not. Then told him to send after the woman. Smith Stallings and I found the clothes in the tub. The woman attempted to wring the clothes. There were splotches on the clothes. Know the clothes to be the same, by the streaked patch. Examined them there. The spots looked like blood. The water in the tub was very dark. We found the hoe in the crib, and saw a little blood on the helve. Also saw a hatchet that looked as if it had been used to cut meat.



Live three miles from Worley's. First went there on Tuesday after the murder. Saw signs of a bruise over the door close to the water shelf. It looked like a hatchet cut.

*Joe Watford* (colored). Was at Bob Thompson's on Saturday before the murder. I saw Bob, Noah and Ben Hilliard. Am a timber getter, and have followed it for the last ten or twelve years. It stains a little in February, on the sleeve and on the knee of pants. It don't stain me anywhere else. It does not stain like blood.

*C. R. F. Kornegay*. Have been handling timber off and on ever since I was grown. I do not think it would stain as these clothes. When the sap is up it stains. It begins to stain about the middle of March or first of April.

*Sheriff D. A. Grantham*. Got those clothes at the inquest at Mr. Atkinson's. Heard Noah Cherry say they were his clothes. Asked him about the stains on them. At first he said that he had stuck a splinter in his finger and that the blood came from that, and then he showed me an old scar; afterwards he said the stains came from oak timber. I told him that it was too much blood to come from his finger. Think the stains are blood. Heard Harris Atkinson say, that on Tuesday after he ate his breakfast, he went to Bob Thompson's and came with Bob across Moccasin. They then separated and he came to the Wayne county road and then went to Cox's bridge. He was going in the direction of Worley's until he struck the county road. That is about the nearest

point of road to Worley's house. Then he went to Wm. Cox's in Johnston county. He came back the near way, which is about three miles. He said the reason was, that he was afraid he could not cross the river. He came to the road at the nearest point to Worley's house. He could have saved a mile by taking the near path. Went to Harris Atkinson's several days after the murder and made a search. Found an axe that I thought looked suspicious, behind the door. There were some things in front of it, and the door was pulled back. It was an old axe-helve, but looked clean as if it had been recently washed. The edge of the axe looked as though it had been cut into the ground. The axe was rusty but it was brightened near the blade, and had not been ground. Have had a good deal of experience with axes. It looked greasy.

*Cross-examined*. Can't say how old the stains are. Cannot say how long before the cut was made on Noah's hand. The stains looked some darker before they got dry. Afterwards, a second time Noah said it was blood. Some of the stains looked darker than others. If there had been dirt put on the axe it would have adhered to it.

*Hunter Hall*. Robert Thompson never mauled any rails for me at any time.

*Reddick Thompson* (colored). Heard Robt. Thompson say a few days after the murder, while I was at Henry Cox's house, if Worley was killed it was about some of his big talk. This was a few days after the murder. Never saw Jerry Cox till a week



after the murder at his own house. When I saw Jerry Cox he was making an axe-helve. He had a fire there and all the axe helve was burnt, except the part sticking in the eye. He was burning out the old helve. Afterwards I saw him burn the old axe-helve.

*Henry Cox* (colored). Heard Robert Thompson say to George Thompson when asked by him what he thought of it, "That if old man Noah was hung, he did not see any chance but for them to hang him too." I married Robert Thompson's wife's daughter.

*Dave Best* (colored). Live in Johnston county; was at Thompson's house on Thursday after the murder. Saw some clothes in a sack behind the door. Saw Bob and he asked me the news. I said, "Nothing only what we all know." I said, "They have arrested General Atkinson and Haywood." Bob said, "They don't know anything about it."

*Cross-examined.* Went there by myself. Don't know what kind of clothes they were in the tub. They might have been children's clothes.

April 25.

*Lewis Cox* (colored). Saw Harris Atkinson on Wednesday after the murder at my house. Asked him if he had ever heard of such a case as this which had occurred at our own doors? I said that Worley and his wife were both killed, and that their brains were beaten out with axes. Harris then said, "I have heard of many being killed since the surrender. If it had been negroes, nothing would have been said about it, but as it was white folks they are making a devil of an uproar." I said, "It matters not who did it, God will pull it out of some of them." Harris said no one had found out who did it, and he didn't reckon any one would find out. Am a brother of Jerry Cox.

#### THE DEFENSE.

*Jerry Cox* (recalled). Told Capt. Fulgham that there was blood on my axe-helve a few days after I was put in jail. I did not tell him that there was only one axe and that Noah Cherry carried that. Saw Lewis Cox the day before I was brought to jail. I never told him anything about the murder.

*Ed Griswold.* Am a magistrate. Jerry Cox was before me as a witness in the case of the State vs. Harris Atkinson. Atkinson was present, handcuffed and the other two defendants were in jail, and had been there several days. Jerry Cox

stated on oath that he met Noah Cherry at the corner of the Toller place, and that Noah told him that he had killed that rascal and that Robert and Harris had helped him. He said it was three quarters of a mile from Worley's house where he met Noah. I administered the oath to him in the usual form. He said he intended to tell all about it. He made different statements at different times. The statement he now makes, he made to me several days after the examination I have related.

*Cross-examined.* I committed him to jail as a witness; have

heard him make several statements since, and they are substantially the same as those made on the stand, with some slight and immaterial variations.

*John Monroe* (colored). Saw Robert Thompson on the night of the Worley murder between 7 and 8 o'clock. He was sitting in a chair nodding.

*Cross-examined.* Came from Fayetteville. Was staying with Mr. Massey. I live a quarter of a mile from Atkinson and also from Robert. Saw Harris a little before sunset. Was ploughing and he was bringing up the wood. Saw Harris that morning. I do not know where he was all that day. Did not see Harris on Sunday. Saw Robert on Sunday, and also saw Noah on Sunday at Robert's house.

*Maria Atkinson* (colored). Lived with Robert Thompson at the time of the murder. Do not know how old I am. Was at Thompson's on the night of the murder; he had hired me to cook and wash for him and to take care of his children. He gave me my food and clothes and \$2.50 a month. Have lived there about a year. Robert went to Harris Atkinson's on Monday about 12 o'clock. It was late when he got back. I had his dinner ready for him. The sun was then about two hours high. Bob did not go off again. He did some grubbing near the house and made a fire. He went to bed sooner than I did. It was 8 or 9 o'clock when I went to bed. Bob was in bed then; he was setting by the fire before when I saw him. When I laid down he had not got up. Wash

for old man Noah. Had been washing for him for at least three months. He came over to our house on Saturday in the rain and his clothes were wet. I said to him, "Here are your old clothes dry and mended up, put them on." He said, "No." On Sunday he got up and washed and put on his clean clothes. He pulled off his other clothes and put them under the bed. Noah stayed there until about one and a half hour by the sun on Sunday, and left his clothes under the bed. I went on Tuesday to Harris Atkinson's and the clothes were still under the bed there. Did not stay there long. Talked to Martha, Harris' wife, and went home. On Wednesday I thought I would wash, so I made some lye, and put Noah's clothes, Bob's clothes and the children's clothes in a tub. I always boil my lye. They stayed in the tub all Thursday morning. I intended to wash them then, but before I got ready Mr. Van Smith, Henry Stallings and the rest came and carried the clothes off. They did not take Robert's clothes or the children's. It was an old shirt and a pair of pants. These are the clothes. Had only one tub; I did not take the clothes out of the tub, they took them out themselves. Bob came there after Christmas. He kept his tools in the crib. These clothes are the ones Noah put on Sunday morning. These here. \* \* \* I made a mistake; them is not the clothes. Noah only had two suits of clothes, two shirts, one white and one striped, and he had two pairs of pants. I say those clothes are the ones he put un-

der the bed on Sunday morning. They did not carry off Bob's clothes.

*Cross-examined.* Heard of the murder first on Tuesday morning; Martha, Harris's wife, told me. She came by and told me. Did not go to Harris' on Tuesday morning. I do not know where Harris was. Bob had gone to Mr. Price's. I went to Harris' on Tuesday evening. Did not swear that I went there Tuesday morning about 9 o'clock. Went there late in the evening. Stayed there an hour. The sun was not down; don't know how high it was. Martha was washing when I went there. Can't tell you what month the murder was committed in. Bob is not married. Have no husband. I saw Bob going to Harris's house. He came back late. It was a cold night. There was only one armful of wood there. None was brought in. Bob did not go out at all. Asked Noah to change his clothes. He said he did not want to. He went to bed and slept in his wet clothes, but put on dry ones the next morning. I am certain these are the very clothes Noah put on Sunday morning. Am positive. I am certain of it. Bob never took any of his tools out of the crib. No hogs were killed there. I should have known if there were any killed. Never told Dr. Kennedy in March that Bob asked me to say if I was questioned that he was at home. Told Dr. Kirby that those were the same clothes that Noah pulled off at my house on Sunday morning.

*Louisa Stevens* (colored). Heard of the murder the next day. I only knew what Noah

told me. The old man stopped at my house and I asked him to take a chair. He said, "I saw a thing I would not see by myself for one hundred dollars." I asked him what. He then said, "I came by Worley's and the dog attacked me; I hallooed out 'Why don't you hail the dog?' No one said anything. I kept the dog off with a rail. Just before I got there I saw Worley lying out by the chimney, then I saw Mrs. Worley lying by the door, either bloody or with a red handkerchief round her neck." I said, "Heavenly Master! Arthur, go and see what is the matter." We went down there. I heard the child crying. The men came up. Noah, Eleanor and I were together. Mr. Price struck the dog and brought out the children. I said, "Come here, Tildie; come here, Tode!" I took the baby; it cried and I wrapped her up in a shawl. We had a fire there. Noah stayed there about an hour and then went off to his work. They sent after him just before night. Noah said the dog attacked him.

*Cross-examined.* He went to the fire and warmed and then told me about it.

*Moses Pearsall* (colored). Was a committeeman. The colored people went to work after the Coroner's jury to work up the matter. We had a white gentleman to act as magistrate for us. Hillary Hastings was present and swore Jerry Cox as a witness. This was March 4. It was "norated" for the colored people to come and testify before the committee. Jerry said he knew nothing about it. Asked him had he told Laurina Atkin-

son that he was in a deep study because he had heard that a man was going to kill old man Noah, and that he was going down to let old man Noah know it? That he expected to take his gun and shoot the man if he tried to kill Noah? He said it was so, but he did not know the man. We put Cox in custody of the Sheriff because we were satisfied he knew more than he would tell. He said he had a wise head and would be a witness for himself. He said he was big at the head and swift of the foot. Jerry said he knew something but he would not tell it till he got his breakfast. After we started for town he told General Atkinson. He said it was old man Noah, Bob Thompson and Harris Atkinson that done the killing. Said he knew because old man Noah had told him so himself the night of the murder. Said he met him three quarters of a mile from his house. Said I know, because Noah told me when we were opposite to Mr. Murphy's back ground. Said old man Noah walked up to him and said, "I have killed that rascal." Jerry said, "What rascal?" Noah said, "That Jim Worley and his wife." Jerry said, "Old man, you ought not to have done it." I then asked him why he did not come to me and tell me of it and they might have been saved. He said he was afraid of Harris Atkinson and his friends. Do not know where Harris Atkinson was at the time.

*Cross-examined.* Heard Maria Atkinson say that Bob was off on Tuesday, and that he seemed to be worried and troubled. She said he told her on

Tuesday night, "If you are asked where I was on Monday night, say I stayed at home all Monday night." She said that Harris and Bob had been together about breakfast time on Tuesday.

*Dr. George L. Kirby.* Am Coroner. The effect of lye or potash on human blood is that it does not remove the stains, but changes them to a dull yellow. It is more easily removed by soft water than by lye. Menstruous blood is deficient in fibrine and it coagulates less readily than arterial blood, for the reason that it is diluted with mucuous secretion. Murder blood will wash out as easily as any other. It is doubtful if one could well tell the difference between the two kinds of blood without the aid of a microscope.

*Wm. Wilkerson.* Live on Wm. Atkinson's land. Went to Worley's on Tuesday evening. Pearce Atkinson and I remained all night with the corpses. Saw a track as I went home on Wednesday about one mile off. Tracked it along the side of the road. It went down into a corn field behind the Worley house. We found a heel track near the house, and we found one in the hog lot. We judged it to be 25 or 30 steps from the house. It was going from the direction of the house. Measured the length and breadth of it, and one of my shoes was the same size. Have lost the measure. Think it was a new shoe, because it cut and made a clear track, and there was no marks of nails about it. A shoe was brought in and it fitted my measure. It was Jerry Cox's shoe. The

tracks did not go towards the turkey bait.

*Cross-examined.* Many persons were around there. There was no sign of blood on the sheets where we laid them out. I took the sheets off the bed myself.

*Moses Pearsall* (recalled). Maria Atkinson was before our committee. She said the clothes were the same Noah pulled off at her house on Sunday. She said she had not seen the clothes all of the time. She told us she went off over to one of the neighbor's houses. Showed Mr. Wilkinson one of Jerry's shoes. It was No. 8. It compared with the measure.

*Cross-examined.* The clothes had not been removed, so far as I know.

*Haywood Atkinson* (colored). I brought a pair of shoes for Jerry Cox on Friday before the murder. They were No. 8. Gave them to Jerry Cox.

*Sheriff D. A. Grantham* (recalled). Have not heard all of any one conversation of Jerry Cox's. Have heard some of his statements, but they were not made under oath. He stated that on the evening of the murder he met Noah Cherry at the corner of the Toler place, and said further that Mrs. Worley came to the bars and shut up the dog. I said to him, "I know you are lying now, because he could not have got out the next day." Then he said she drove the dog under the crib. He said that Noah struck Worley in front of the door. He made the same statement as he made to Griswold. He said that Noah threw her down and raped her first. After Bob and Harris got

through they let her up. She started to run out of the door, and Noah struck her and she fell by the steps. He said that Noah carried an axe and that Bob had an axe and a stick. He said the reason they had to kill her, she screamed and hollered so much, to keep her from going crazy.

*Sarah Massey.* Know Harris Atkinson. He lived on my father's farm. I saw him at sunset on Monday evening the day of the murder, at his house. He had a turn of wood and threw some of it down. Think to the best of my recollection it was about sunset.

*Jacob Davis* (colored). Know Harris Atkinson. Harris was at my house that Monday; he stayed there all day to put up a horse stable. He left me about one and one-half hours by the sun on Monday evening. He came back to my house after daylight was down to get me to go and see Perry Thomas with him about a steer he had to sell. I said I had my shoes off and told him to go by himself. He said, "I don't like to be fooling around a strange plantation," and said he would let it alone till tomorrow night. He stayed with me about an hour. He said he was going next morning over the river. When he left my house it was two hours after sunset. That was on Monday, the 11th of February.

*Cross-examined.* Married Harris Atkinson's sister. Told the colored committee that I thought he stayed there about two hours. Told them he came a little after day-light down. Never told Wm. Maysoon after

the murder or at near the house, that Harris left my house before dark. Do not know whether I told him to come back or not. Don't know what month this is.

*Cherry Davis* (colored). Harris was at my house on Monday; he came between 9 and 10 o'clock at night. About daylight down he came back again. He wanted me to go to Perry Flowers with him. Perry Flowers is a big white man. Harris said he did not want to go by himself. Am Harris Atkinson's sister. I don't know exactly what time the murder was done. I have talked this matter over once with my husband.

*Wm. Richardson*. Harris was at one of my houses on Tuesday night, and crossed the river with me on Wednesday.

*Cross-examined*. There were a great many that crossed then. Have never heard of any complaint. It is unusual to go round to get to Cox's.

*Arthur Stevens* (colored). Harris has a canoe at the bridge but it is bottom side up.

*Capt. R. T. Fulghum*. I saw Jerry Cox in jail. He told me he had burned the axe and helve. He said also that there was blood on the helve of his axe. Told me that at the murder there was only one axe, and I think he said Noah Cherry had that.

*Nathan Deans*. Heard that Worley was murdered on Monday night. Jerry Cox came to my house about 1 o'clock on Monday, and we went up to Harry Holt's and sharpened our axes. After this he went off towards home. The helve in his axe was not more than two feet long.

*Alvin Stallings*. Saw Noah about an hour in the night on Monday. I live about a mile from Melvin Atkinson's. Noah came to my house and sat down. Noah said he came to ask me to lend him some meal. I told him that I had none, and that I was shelling corn to send to the mill. He then asked me for an ear of corn to roast. I gave him one. He talked a good deal about staves and also about women. He said there was no dependence to be put in them.

*Cross-examined*. He stayed at my house about 15 minutes; about an hour in the night. Have seen those clothes before; Noah had them on that night, or at least the pants. His coat was buttoned up so that I did not see his shirt. I know these pants by the patches on them. Both pairs of his pants are patched.

*Isaac Atkinson* (colored). Live a mile from Melvin Atkinson. I saw Noah Cherry on the night of the murder. I saw him at the branch about three quarters or one hour in the night.

*Cross-examined*. Was with Melvin Atkinson and Lewis Atkinson. Noah was coming from the direction of Mrs. Murphy's and I saw him at the branch. Had no watch. I was convicted of stealing nine or ten years ago. There was no one at Melvin's but his folks. It took me three quarters of an hour to go three miles.

*Lewis Richardson* (colored). Was with Isaac when we met Cherry about two and one-half hours from sunset, about 100 yards from Melvin's house. Am positive it was Noah.

*Cross-examined*. Cherry was



going toward Melvin's, coming from towards the Worley place.

*Ailsey Atkinson.* Am Melvin Atkinson's wife. I saw Noah Cherry on the night of the murder. Was in mother's house when he came. I saw him afterwards setting there talking. He was there when I laid down and when I got up.

*Dr. J. B. Kennedy.* Maria Atkinson did tell me about Bob wanting her to swear, if she was questioned, that he was at home. Melvin Atkinson has a good character.

*Cross-examined.* She said Bob told her on Tuesday night; and said in conversation, "I have done my level best to find out the murderers."

*Moses Pearsall.* Know the character of Maria Atkinson is bad. She is accused of telling lies. She has been "upper-hander" (apprehended) in telling stories.

*Wm. F. Atkinson.* Maria Atkinson's general character is bad. It is bad for lying and stealing.

*Ben Hinnant.* John Monroe came from there about an hour in the night, and left between 9 and 10 o'clock. I had no time-piece. I have no clock. I mean an hour after sunset. Can't say how long he stayed there.


*Wm. F. Atkinson (recalled).* The character of Isaac is bad for lying and stealing.

*April 26.*

*Mr. Moore* said it was undoubtedly true that more than one person was engaged in the murder; that the crime committed was the most horrible in the annals of such cases: Horrible and fiendish in every respect; that it was committed upon less provocation, and more brutality than ever he had heard or read of. The motives were to rid the islands of Worley's presence, and to have illicit intercourse with Mrs. Worley. The fact that Cherry was the first to give the alarm next morning was a strong circumstance against him. He paid a glowing tribute to the law-abiding character of the people of Wayne county, inasmuch as they had risen above all passion and indignation, and abstained from lynching the prisoners. He had no doubt that Jerry Cox was present at the murder, and was doubtless endeavoring to screen himself. The question for the jury was, were the other prisoners there with Jerry Cox? It was unnecessary that the jury should believe the whole of the testimony of Jerry Cox, but if you can put his story and that of the other witnesses together, to make a complete whole, so as to convince you that Cox has told the truth in the main particulars, you may convict. Cox could not have made up the



tale he told if it had been a lie out of whole cloth. It was impossible to believe that he was there by himself. It was in evidence that Mrs. Worley was a powerful woman, and too much for any one man to handle. Again, it was a noticeable fact that Cox had never, at any time, charged any person with the horrible deed except the three prisoners at the bar. There was no material difference between the witnesses for the state, and those of the defendants' excepting in the testimony of Maria Atkinson. The various facts of blood, the axe and other signs of murder on the house and in the yard, all corroborate Jerry Cox. Jerry certainly did not examine Mrs. Worley's person, and yet Dr. Kennedy proves conclusively that she was outraged, by the signs on her person. This was a very strong circumstance in corroboration of Jerry Cox. The prisoners' testimony shows beyond question that they were engaged on Monday in manufacturing testimony to suit themselves. The testimony of Sarah Massey and of Jacob Davis and his wife might all be true, and doubtless was, but it had no weight. Harris Atkinson had sufficient time, after they saw him, to have gone to Worley's and been there when the murder was committed. Where was he after the murder? Noah Cherry added perjury to his guilt. He had induced Maria Atkinson to swear falsely for him. The testimony of Alvin Stallings had proved Maria Atkinson a liar about the pants, and that had sealed the fate of Noah Cherry. It was in evidence that Noah had two pairs of pants; why was not the other pair produced here? It was beyond question that somebody had lied about the pants. If the stains on the pants and shirt was not blood, why were they soaked in lye? According to the testimony of Dr. Kirby, the action of lye upon blood stains is to turn them a dull yellowish color, and this was precisely the character of the stains exhibited to the jury upon the clothing of Noah Cherry. Robert Thompson had also tried to prove himself clear by the perjured testimony of Maria Atkinson. What consideration should be paid to her testimony was a matter for the jury, but it had been proved by witnesses who were unimpeached, that her charac-



ter for lying and stealing was bad. He concluded by cautioning the jury against convicting innocent men, and said that the state did not ask for a verdict, unless the jury was satisfied beyond a reasonable doubt that the prisoners were guilty.<sup>6</sup>

*Mr. Kerr.* If your Honor please, and Gentlemen of the Jury: It has been the boast of the English law for centuries that no man should be tried save by a jury of his countrymen, whose minds are free from bias, and who are willing to answer under oath that they have neither formed or expressed an opinion that the defendants are either guilty or innocent of the crime with which they stand charged; and while I would congratulate these defendants upon the fact that they have a jury of intelligence and strict impartiality to pass upon the issues of life and death between them and the state, I would beg of you, gentlemen of the jury, to remember that you are to try these prisoners solely upon the evidence produced here upon this trial, and not by any hue and cry of the community for their blood. I am here to assist in their defense; by the appointment of his Honor, without fee, reward or hope of reward; with fear of none and without asking the favor of any. My intention is to do my duty according to the dictates of my conscience, so that in after years there will be no remorse for duty half performed. Whatever may be the issue in this case, I shall fulfill all the requirements of counsel, and carry from the court room the best of all rewards—an approving conscience.

That there has been committed in our midst, one of the most diabolical crimes that has ever stained the pages of history in any civilized land, is a question about which no man can have a rational doubt. The atrocity of the crime for which these defendants are now on trial, is scarcely equalled by the most outrageous deeds committed by the savages of the

<sup>6</sup> By agreement between prisoners' counsel, Mr. Kerr was to dwell upon the facts in the case according to the testimony. Wassom was to argue the alibi for Noah Cherry, and Capt. Swift Galloway to close the argument upon the law and facts.

West. But you will remember, gentlemen of the jury, that neither the heinousness of the crime, nor the cry of vengeance set up by an outraged community, have anything to do with your duty upon this solemn occasion, and you will beware how you take a human life, which you cannot restore.

The state had asserted its ability to show as a motive for crime, the desire to remove Worley, that lawless negroes might be free from his interference. The state had failed to prove this. It had not been shown that Worley had given any information against any of the persons living in the islands, and there was no motive to get rid of him on this account. As to the maps exhibited in court, it was a singular circumstance that the house of Jerry Cox, one of the principal actors in the tragedy, was not laid down upon either of them. Jerry Cox is the man whose testimony you are asked to believe; who stands before you a confessed accomplice, a vile wretch, who has pretended to turn State's evidence, and yet does not tell half of the facts which must be within his knowledge, and the story which he does tell, will be shown to be one tissue of lies from beginning to end. There are twenty-five different instances wherein Jerry had lied, and Jerry was not to be believed as to these defendants; he said he knew a month before that Cherry intended to kill Worley, and yet he never mentioned that fact. He had been mad with Cherry because Cherry had told a story on him about a girl, and had refused to pay him what he owed him. Was there not a motive here to swear against Cherry. It was a most remarkable story that Cherry took Cox along with him to witness the murder of two persons, and yet he never told Cox what he was going to do, or where he was going the night of the murder. Why did he ask Cox to meet him at the Toler place? If this story of Cox's be true, then Cherry and the other defendants were great fools to provide a witness whose testimony would hang them. He fixed the crime upon these defendants to screen the really guilty parties who were there that night with himself. He lied about the number of blows given the deceased persons.

He lied about the dog; he lied about the axe; he lied about Worley's exclaiming "Hell Fire," when it was proven that the first blow dealt him deprived him of the power of speech, and he lied about the reason why he did not tell at first the story which he now tells. Cherry and Thompson were then in Jail in Goldsboro, and Atkinson was in jail at Smithfield—they could not hurt him. He then said he was afraid of their friends; why was he not afraid now? They are all free—none of them are in jail! What did Jerry Cox sharpen his axe for on Monday before the murder that night? Why did he burn up the helve the next day? There is no corroboration of Cox in any particular. He lied to the Coroner, he lied to the Sheriff, he lied to the colored committee, he lied to Griswold and he lied to Captain Fulghum.

The facts about the house and the blood would have answered for any of the witnesses for the state; there was no independent fact which went to show that Cox had told the truth about the transaction, and especially that the defendants were the guilty parties. Melvin Atkinson had proved a good character, and he had said that Cherry did not have on the pants in question on Monday night when Cherry went to his house. Maria Atkinson told the truth about the hoe and hatchet, because she is corroborated by B. V. Smith. The state proposes to make her out a liar whenever it suits their convenience, and to make her tell the truth by the same rule. If Cherry had on the pants at Melvin Atkinson's on Monday night, how did he get them off and back over to Bob Thompson's the next day before he was arrested? The testimony of Sarah Massey, and of Jacob Davis, had established a clear alibi for Harris Atkinson. He appealed to the jury, that they should not permit themselves to be influenced by the passions of the hour, but to render such verdict as they would have no regret for at the last day.

*Mr. Clarke* appealed to the jury to do their whole duty fearlessly and without regard to outside opinion. If the state had not made out its case, beyond a reasonable doubt, then that doubt was to the credit of the prisoners; if it had, in the

opinion of the jury, made out its case beyond a reasonable doubt, then the state asked for a verdict.

*George T. Wassom* (colored) sought to prove an alibi for his client Cherry. An atrocious crime had been committed within the borders of North Carolina, and these defendants were here as prisoners accused of it, and in peril of their lives. The duty of the jury was a grave and solemn one, and one which they could not lightly dwell. I shall endeavor to present you facts which shall assist you in making up your verdict. I hope to be able to show that Jerry Cox has fabricated and made up entire, the story which you have heard him tell here upon this stand. And I hope to prove to you that he told it to clear himself. *Wassom* pointed out the different facts, as to distances, time and other matters, tending to convince the jury that Cox had lied, and had represented matters which were impossible and which proved themselves false. He contended that the testimony of this witness for the state had proved an alibi for Noah Cherry, and reiterated the statements made by Mr. Kerr in reference to Jerry Cox. He (Cox) had lied before the Coroner's inquest; he had lied to the Sheriff; he had lied to the colored committee; he had lied to Mr. Griswold and he had lied to Captain Fulghum. His whole statement from beginning to end, had been one solid lie. It must be evident to the jury from these frequent false swearings that Cox was here for the purpose of committing perjury in order to save his own neck. In only one thing had his testimony been consistent: He had proved, unconsciously, a clear alibi for Noah Cherry.

*Mr. Galloway* alluded to the fact that he had been assigned as counsel by the Court, and that he appeared without reward, except such as came from a sense of duty well performed. He felt fully the responsibility with which he was charged, but should enter upon his duty fearlessly. He had not therefore crouched to the public clamor and cry for the blood of these defendants, and he should not do so now. He felt here that outside influences would not enter the jury box, and that the defendants would receive a fair and impar-

tial trial and verdict. I have no words to express my indignation and horror at the crime which was committed in your county on the night of the eleventh of February last. As I recall the triple, shocking outrage, my blood curdles in my veins, and I shrink from the contemplation of the details. Surely it was enough to stir violently the imagination and to fever the blood of a virtuous community. Thus far the feelings engendered are natural, honorable and praiseworthy. But, while the blood of the Worleys, like that of Abel cried up from the ground for vengeance, it is no part of your duty, gentlemen of the jury, to satisfy that righteous cry, by the imolation of the first poor wretches upon whom a bare suspicion falls. The very enormity of the crime should cause you to brace yourself with scrupulous care, against any tendency to prejudice those under accusation. I am deeply sensible of the heavy responsibility resting upon me and painfully feel the awful solemnity of this occasion, and, gentlemen, there seems to fall upon ears as a message, alike to you and to me, the words of Holy Writ, "Judge righteously and plead the cause of the poor and needy." I have an abiding faith that you will not permit the outside influences to which I have alluded, to color your judgment or affect your deliberations.

The Solicitor remarked in opening the argument, that in no other community would these prisoners have been suffered to live a minute. In that utterance so unbecoming here, surely he wronged himself. It must have been born of the excited feeling of the moment, and could not have been made upon sober reflection. Mr. Dortch in opening the case had foreshadowed facts, which he had failed to prove. Men had been put upon the stand who confessed they were deaf, and yet had testified that they had heard a man groan at a distance of fifteen yards. Talton said that he had seen Cherry in the afternoon of Monday about sunset, and if Talton was to be believed, his testimony had proved a complete alibi for Noah Cherry. If Talton told the truth, then Jerry Cox lied. The entire testimony had shown that the state had been grasping at straws. Jerry Cox had been sworn four times; once

before the Coroner at the inquest, once before the colored committee, once before Mayor Griswold, and again in this trial. Cox admitted that on the first three occasions he had sworn falsely. In the twenty-five different instances cited by Mr. Kerr, it was proved that Jerry Cox had deliberately lied, and committed perjury. Maria Atkinson had been supported and corroborated by Mr. Van Smith and Melvin Atkinson. If Maria had desired to perjure herself for Bob Thompson, why had she not said that Bob had killed a hog and got this hoe and axe bloody from cleaning and cutting up the hog? Then again, Jerry had not said the hoe and hatchet were at Worley's house. Why was the finding of the hoe and hatchet brought out? It showed that Jerry had lied if the jury believed that the hoe and hatchet were used to kill the Worleys. This view of the case effectually killed the testimony of Cox, and it must be taken as truth by the jury, because it was supported by the testimony of Smith and others, who went to the house of Bob Thompson and found the hoe and hatchet in the crib. These gentlemen found there no stained clothes except those of Noah Cherry. Bob Thompson had made a simple request or notice to Maria Atkinson to remember that he was at home that night, only because there was great excitement about the murder, and frequent arrests were being made; and he did not do so for the purpose of inducing or persuading her to swear falsely. Why had the state not introduced little Tildie Worley upon the stand as a witness? She had not been offered as a witness; the Court had not found that she was incompetent and could not testify. Why, a little girl six and a half years old, at Johnson county court, a few weeks ago, gave clear and convincing evidence in a murder case and the defendant was convicted.

The clothes of Noah Cherry had not been submitted to a chemical test to ascertain whether the stains on the pants and shirt were blood or other substance. Now the jury could not believe it was blood because it was not in proof. Why did the state not have this test applied? If found to be blood, it would have relieved this investigation from very much



which clouded it. The jury must remember that little Tildie was taken off by J. W. Batten for fifteen minutes and talked to, and when she came back she said that old man Noah killed her papa. It was not proven that Cherry heard her when she said this. Cherry had been to Worley's often and did not think it necessary to deny or answer what the little girl said even if he heard her. The testimony of Lewis Cox is not to be believed. He was a swift witness and wanted to help out his brethren. It was argued that Cherry went back to Melvin Atkinson's sooner than he said. If this be so, then it was a circumstance in his favor, because he would not have aided in the murder and then gone back that night to Melvin's, because he would have known that it would have been a strong point against him. Then again, Melvin sustained Maria about the pants. Melvin says the pants that Noah had on when he came back Monday night looked like they had been washed. Lewis Cox, Henry Cox and Dave Best had assisted Jerry Cox to murder the Worleys. Jerry Cox had made up his perjured statement to shield himself and his brothers, and Best.

We call upon the jury to rise above yielding to popular clamor for the life of the prisoners. My task is almost done. I am about to commit the defendants' case in this trial into your hands. I feel that so far as in my power lay, I have done my duty to justice, truth, and these defendants. I entertain the pleasing assurance that you will reach and express your conclusions without fear or favor, and influenced only by the dictates of enlightened consciences. May you be endowed with wisdom from on high to guide you to a righteous verdict. The state whose laws you sit there to aid in administering inculcates mercy to her citizens, even in the forms of procedure in her courts, and when these defendants were arraigned upon this charge, she wished them "a safe deliverance," and now speaking from an honest conviction, in view of all the evidence, I echo the benign salutation, and say to Noah Cherry, Robert Thompson and Harris Atkinson, "God send you a safe deliverance."

*Mr. Dortch* congratulated the jury upon the fact that their

labors were about to close; they deserved the thanks of the Court for the patient and careful attention they had given the case from beginning to end. This is a most important case and pregnant with the most fearful consequences to these prisoners. It is important to the state that the people may know whether they are to be protected in their life and property. You must not jump to a conclusion. You are to remember that however humble these men may be, they are entitled to the benefit of any reasonable doubt which may exist in your minds. I should dishonor myself and deserve your contempt were I to ask a verdict of guilty at your hands, unless I honestly and conscientiously believed these defendants to be guilty. I have no interest in this case upon the point of protection for myself and my family. We are safe in this town. But how is it with you, gentlemen, who reside in the country? These murders and outrages must be stopped; therefore, if the state has convinced you beyond a reasonable doubt, that the prisoners at the bar are guilty, you should promptly convict them and allow the law to take its course. You are in no way responsible for the administration of the law, and you will not allow your verdict to be affected by any outside influences; as honest men you cannot do so. You will receive the law from his Honor; the evidence is solely for your consideration.

The prisoners' counsel has charged that the state's counsel endeavored all through the trial to get incompetent evidence before the jury. There was no foundation for this charge. We have used every effort to be fair and impartial, and allowed nothing to go before the jury that was not entirely competent. This was an undue attempt upon their part to influence the jury, but I am satisfied that you are not to be swerved from your plain duty, by any such argument. One of the gentlemen called upon God to witness that he believed the defendants were not guilty. I shall not do that; I shall give you the reason from the facts in evidence, why I believe them to be guilty; and the decision will then rest with you. Then again, the gentleman said the state had

slipped up in their case. I opened my eyes and ears when I heard this assertion. I do not think it possible that Messrs. Moore and Clarke, both good lawyers, and myself, who had been at the bar for many years, could have made a fatal mistake in the trial of the case. What was this fatal mistake? Nothing more nor less than the failure to produce little Tildie Worley as a witness for the state. He said that we ought to have introduced the best evidence, and because we did not do that, according to his judgment, the defendants were entitled to an acquittal. Why, gentlemen, if he had believed himself, he ought to have risen as soon as the state closed its case, and asked his Honor to direct the jury to return a verdict of not guilty. But such is not the law. The rule of law, as to the best evidence, applies entirely to written evidence. The Supreme Court has decided in the State against Haynes, 71 N. C. Reports, that the Solicitor has the right to introduce with order whom he pleases as witnesses, and when he pleases. And many other cases decided by Ruffin, Daniel and Gaston show that the introduction of witnesses was entirely within the control of the officer who represented the state. The Judges who decided those cases are all dead. They were honored while living, and will be revered and respected to our latest posterity as upright and learned Judges.

Now, gentlemen, I shall address myself to the testimony in this case. If I do not convince you beyond a reasonable doubt that defendants are guilty, acquit them. We admit that Jerry Cox was an accomplice; that he helped to commit the horrible murder and outrage that night; that Jerry Cox had told lies; that he had not told all he did the night of the murder; but that did not matter, if he had told a thousand lies prior to the trial, provided that the jury believed what he said about it when sworn and testifying before them. It would be monstrous if an accomplice could not be used in the trial of capital crimes. Often it was the only evidence that could be obtained, and to say that such testimony ought not to go to juries for what it is worth, would be to say that numerous criminals should not be punished for hellish deeds like this. If the law

was otherwise in this respect, life and virtue would not be safe in the country and state. It is necessary for society that it should be so. The defendants' counsel charged that Jerry Cox, Lewis Cox, Henry Cox and Dave Best had committed the murder. Such a charge should not have been made unless there was evidence to support it. It is unwarranted license upon the part of counsel to charge witnesses or any other person with a capital felony, without the strongest proof to bear out and support the charge. It is well enough to ask at this juncture, why the defendants did not prove a bad character for Jerry Cox, if he was such a liar and scoundrel as they make him out to be? It was their duty to have proven the character of all the state's witnesses if they could have done so. They did not attempt to impeach any one of them. Two of their witnesses were directly impeached, and others indirectly discredited. They had no witnesses to support their character. Now as to the circumstances which corroborated Jerry Cox in his account of the murder. I want to call to the attention of the jury the fact that the back door of the Worley house was found pinned next morning, as Jerry had said. That there was blood on the hearth, chairs and floor, showing that the assault had been made near the fire-place. This accounted for the fact that Jerry spoke only of three blows, that he saw given to Worley and his wife. He heard the others, but could not see them. The blood on the chimney, under the water-shelf, and on the sill under the house, were corroborating facts as strong as Holy Writ. Jerry had not been to the house since the murder; he had not seen the blood under the water-shelf and on the sill under the house. One man did not commit this crime. The defendants were at Bob Thompson's together, on Sunday before the murder. Gentlemen of the jury, if you cannot convict upon such testimony as I have recited to you, then the law ought to be abolished and allow every man to take care of himself. Now, what are the separate circumstances as to the guilt of Cherry? He was seen at the Toler place about sunset before the murder; he was convenient to the Worley house, and was walking in the woods,

killing time until the hour arrived for him to meet Cox. He was not in the path, he was in the woods, and did not want to be seen. He had on the same clothes which have been exhibited to you; the splotches or stains were not on the pants when Batten saw him before the murder; he lied about the stains on his clothes; he left the house of Melvin Atkinson on Monday, and said that he would not be back until Saturday night, and yet he returned that very night; he was the first to tell next morning of the murder. He was then trying to screen himself; little Tildie said he killed her papa, and pointed at him and said, "There he is now!" and Cherry never said one word; he was struck dumb and could not deny it; he was accused from an unexpected source.

Now as to the separate points against Robert Thompson. The bloody clothes of Cherry were found at his house when he heard of the arrest of General Atkinson and Haywood Atkinson, he said they did not know anything about the murder; the hoe and hatchet were found in his crib; he lied about mauling rails for Hunter Hall. There were signs of a hatchet in the Worley house; and then he said in talking to Price, that some parties from a distance killed the Worleys because of an old grudge, expecting it would be laid on Cherry. He said also that James Worley had been killed about his big talk, and lastly he said if they hanged old man Noah, he did not see any chance but that they hang him, too. He was right about this, as he will soon find out.

The separate points about Harris Atkinson are these: When Van Smith went after him as a witness, he said he was not going to be a witness. Tuesday after the murder he went five miles out of his way to get to the house of William Cox; an old axe was found behind his door; it had been recently washed and greased; it looked bright at the edge as if it had been stuck in the ground; he said when told of the killing that that was nothing; that he had heard of many men being killed since the surrender; if negroes had been killed, nothing would have been said about it, but as it was white folks, a devil of an uproar was being made; he said that no one had found

out who committed the murder, and no one would find out. On Tuesday after the murder clothes were found in soak at his house.

Now what has the defense shown? There is a great variation as to the time set by the various witnesses. They had no time pieces, and therefore could not tell what time they saw the defendants. The alibi has not been made out in any point of view. Why did they not introduce Bob Thompson's son? The story told by Jacob Davis proves that he was lying, and the testimony of John Monroe proves that he was lying also to help Bob in his alibi. In the face of the testimony of Jerry Cox, supported and corroborated as it is, I do not care for their proof of an alibi; it cannot outweigh the evidence of the state's witnesses. I have done my duty. I have presented the case before you fairly and fully; if you are not convinced, beyond a reasonable doubt, that the defendants are guilty, then, gentlemen, acquit them.

#### THE JUDGE'S CHARGE.

JUDGE KERR. Gentlemen of the Jury: You have been repeatedly told this is a case of great importance, and I again repeat the caution. Upon your verdict depends, not only the lives of the prisoners at the bar, but also the welfare of the community. The criminal law should be administered in a just and impartial manner. Justice, gentlemen, is an attribute of God. So in the political institutions of man, the absence of justice would be extremely hurtful to those interested. But, on the other hand, you should not let sympathy for the prisoners prevent you from doing your duty. Duty, gentlemen, can only bring consolation to the man who does it, no matter what may be the result. It is your duty to weigh the evidence carefully. Look at the case just as if you were trying one of your most respectable white neighbors, if he were charged with such a crime. It is the boast of our law that it knows no high, no low, no rich, no poor. In respect to all matters against a man, he has a right to be tried by a jury of his equals. Now I charge you to be extremely careful. We

all know, from the peculiar circumstances of our country, for the past few years, that the mind is apt to be somewhat prejudiced against the colored race. Be on your guard! A juror is required to take a solemn oath; he calls on God to witness that he will make a true deliverance between the state and the prisoners at the bar, and he makes a fearful malediction on his own soul if he fails to do his duty. This is a most atrocious crime, but you are not to consider that, it is a fact calculated to mislead you. You must especially be guarded against such influences. The case has been ably argued on both sides, and it is to be regretted that anything like heat or passion has occurred. I think it very creditable to the profession to see counsel exhibit so much zeal for their clients, when they have been assigned to defend prisoners from whom they can never hope to receive reward or compensation for their arduous labors.

The JUDGE then drew the distinction between direct and circumstantial evidence, and gave the rules applicable to the testimony of an accomplice in plain, impartial and unmistakable terms.

If, gentlemen, after weighing all the testimony, you cannot help doubting as to the guilt of all or any one of the prisoners, it is your duty to acquit them. And now I caution you that you know how they are to be tried. You must try them and make up your verdict as to the guilt or innocence of each separately, for though they are jointly indicted, they are entitled to all the benefits of a separate trial. For example, take Noah Cherry and inquire, does the evidence satisfy us that he is guilty? And so of the others.

#### THE VERDICT AND SENTENCE.

The case was given to the jury shortly before two o'clock, and they were placed in charge of an officer with instructions to allow them to get dinner, and afterwards to lock them up for deliberation. The most intense excitement prevailed in town and various speculations were indulged in as to the probable character of the verdict. But one opinion, however,



seemed to prevail, that the verdict would be fatal to the prisoners.

At twenty minutes past four, the *Jury* announced their readiness to render a verdict, and the information was a signal for a general rush to the court room. The prisoners were brought again in the presence of the *Jury*.

The *Clerk*. Gentlemen, have you agreed upon a verdict?

*Mr. Holland*. We have.

The *Clerk*. How say you, do you find the prisoners at the bar guilty or not guilty? *Mr. Holland*. *Guilty*; and the verdict was so recorded.

JUDGE KERR. Prisoners at the bar, you have heard the verdict of the jury; have you anything to say why the sentence of death should not be pronounced against you?

There was no reply, and his Honor proceeded. He besought the prisoners to put their trust in the Lord Jesus Christ, whose blood alone could cleanse them from their sins, and secure them pardon in the great hereafter. He told them not to delude themselves with any hope of earthly pardon, for their death was sure. The sentence of the Court is that you three, Noah Cherry, Robert Thompson and Harris Atkinson, be taken from the Court room back to jail, by the Sheriff of the county, there to remain till Friday, the fourteenth day of June, and then that you be taken by the Sheriff to the place appointed by law for the execution of criminals, and then that, you and each of you, there between the hours of ten o'clock in the morning and four in the afternoon, be hanged by the neck until you be dead; and may the Lord have mercy on your souls.

The prisoners displayed no feeling at the rendition of the verdict or at the sentence; they were removed, and the multitude that had crowded the court room dispersed; the public pulse beat freer, and universal satisfaction was expressed at the righteousness of the verdict. A few days later, the witness Jerry Cox was released, with instructions from the Court to leave the state, and never return. Everyone believed he

was as guilty as the others and regretted the necessity which required him to be selected as witness for the state.<sup>7</sup>

### THE EXECUTION.

*June 14.*

The day dawned bright and fair. All last night people were pouring into the town from all directions, in buggies, ox-carts, on horse-back, and in every conceivable vehicle. In the morning the railroad brought a large number from districts further away. At two o'clock in the afternoon the prisoners left the jail, and were brought to the Court Green, where the scaffold was erected. An immense crowd greeted them, and in one of the windows of the jail could be seen little Tildie Worley and the two other children of the murdered couple,

<sup>7</sup> "Noah Cherry is a copper colored negro, and is 64 years of age. He is about 5 feet 7 inches high, and weighed, before being confined in jail, 155 pounds. He has a stooping, ungainly figure, and his head and face are covered with a shock of grizzly gray hair and beard. His countenance is not at all a pleasing one, and he has manifested considerable obstinacy and temper since his imprisonment. At this interview he informed us that he desired to make a speech on the scaffold, and wished us to print it in order that the children might not suffer from the scandal of his being executed for a murder of which he was innocent.

"Harris Atkinson is a full-blooded negro. .He has a repulsive cast of countenance, and his head sits low upon his shoulders. The forehead recedes, and his features are lacking in any indications of intelligence. He said, 'I was raised in Johnston County by the late Richard Atkinson; I am 38 years old, and stand 5 feet 10 inches high. I weigh about 160 pounds, or did before I came to jail. I am married, and have four children of my own. My wife was a widow when I married her, and has one child by her first husband. I have made arrangements for my burial, and my body will be taken care of by my family and friends.'

"Robert Thompson made the following statement: 'I am 42 years old, and was raised in Wake County, by Mr. Thompson, father of Dr. John R. Thompson. My weight, just before I was brought to jail, was 215 pounds. I have three children, the oldest a boy 15 years old. Moses Pearsall and my friends will take charge of my body.' Thompson is what is termed in Southern parlance a griffe, a shade of color between a negro and a mulatto. He stands about 5 feet 8½ inches high, and has the most pleasant countenance of the three. In fact, an acute physiognomist would fail to detect in his features any indication of his being a murderer." Bonitz's Report, p. 63.

the two youngest in a woman's arms. When they had ascended the scaffold, the Sheriff informed the culprits that he would give them twenty minutes each in which to speak to the crowd. Noah Cherry spoke first. He said:

"Old Noah is to be hanged today for nothing on God's earth. Everything that has been said about Noah and the Worleys is wrong. I never saw Jerry Cox that night; never saw him from the 8th of February to the 17th; all that was printed and said in the court during the trial was false. I am just as clear of killing Jim Worley as the Judge who sat in that court house. My heart is clear; I have done nothing to be in prison for, and certainly nothing to be hanged for. This much is truth: Jerry Cox put this on us. He done it, and did good business in clearing himself. He is about to have three innocent persons put to death. Write to my daughters, Bernetta and Isabelle in Bertie, and say to them to take care of the property I got there, and to take care of themselves and all the family—I am gone; gone on false reports. Not the first words of it are truth. The truth has not been told yet in this matter. Everything in the court house was about old Noah, and I know nothing of it. Great many of you are mistaken about this. Jim Worley was as nice a man as ever was born. I lay in jail four weeks but was treated fair. Write my children and tell them they must try and go to Heaven. I want to go there, but am not quite sure of it. That rascal, Jerry Cox, lied on me. I am just as innocent of that murder as if I hadn't been born."

Harris next arose and addressed the crowd. He said:

"It is lies put me here; a lie made up by Jerry Cox, and white people helped make up his evidence. I see them looking at me now, and I will give their names if I am given time to speak. Lots of them have been in the prison since I have been here, and try to be admired for Jerry Cox's testimony. I think I can show how Jerry Cox came to fix it on me." He thanked his Counsel for what they had done, and said that Galloway, Kerr and Wassom did their full duty in their behalf; but calumniated, and accused of the grossest falsehood, one of the attorneys for the prosecution, and said: "If what I say insults anybody, I can't help it."

The entire remarks were delivered in bad humor, and with maliciousness written upon every feature.

Robert Thompson, who all this time had sat surveying the crowd, and paying but little attention to the remarks of Noah and Harris, then spoke. He said:

"I suppose this is the last time we will be together, and I hope to tell the truth while I am standing on the gallows, and I am about to die, and that will be soon. I am accused by Jerry Cox of killing

the Worleys. He ought to be sitting right where I am sitting today. Jerry Cox told just as grand a lie as ever was told." Here he went into an elaborate defense of Noah Cherry, upon the ground that the clothes upon which he had been convicted had been at his house since the Sunday previous to the murder, and that the witness who testified in the first place as to these clothes having been worn by Cherry on the day of the murder, had sworn to a lie. Thompson concluded: "I don't know who killed the Worleys; I am on the gallows, and believe that Jerry Cox did it. I don't know about Noah and Harris, but I clear Bob Thompson. I have to meet my God, and that before many minutes, and I want to meet Him in truth; I have made my peace with God."

The Sheriff of Wayne county then read the death warrant, the ropes were put around their necks; the black caps adjusted, the chairs on which they had been sitting removed, and their negro friends permitted to go upon the scaffold and shake hands with them. This occupied a few minutes, and then the drop fell.

## THE ACTION OF JAMES MAURICE AGAINST SAMUEL JUDD, FOR A PENALTY, NEW YORK CITY, 1818.

### THE NARRATIVE.

Is a whale a "fish"? This was the question that for many days engaged the attention of a court and jury, a distinguished array of counsel and a crowded court room, in the City of New York in the first quarter of the nineteenth century. The New York Legislature had passed a law requiring all "fish oil" sold in the state to be first inspected and branded, with a penalty for any one who should buy or sell any oil that was not so inspected and branded. The defendant was sued for the penalty and his plea was that the uninspected and unbranded oil that he admitted having purchased was not "fish oil," but was whale oil.

And to show that a whale was not a fish, the defendant brought a number of witnesses, captains of whaling ships from New Bedford and other Massachusetts ports, the seat of the whaling trade, and dealers in oils in several states, who deposed that they never regarded the whale as a fish and never considered fish oil to mean or include whale oil. But their star witness was Doctor Samuel L. Mitchill, the leading scientific man of his day in America; a professor in Columbia College, and a man of affairs, who had represented his state in the United States Senate. He unhesitatingly declared that a whale was no more a fish than a man, and added that nobody thought it was but lawyers and politicians.

All that the state had to present in reply were the opinions of merchants in New York, who said that no matter what the Yankees in the East thought, in this city everybody called a whale a fish and called whale oil fish oil. And the jury, being

all New York men themselves, rejected the opinions of the celebrated naturalist, and the Massachusetts captains, and found in accordance with local sentiment and local ideas, that a whale was a fish and that whale oil was fish oil.

### THE TRIAL.<sup>1</sup>

*In the Mayor's Court, New York City, December, 1818.*

HON. RICHARD RIKER,<sup>2</sup> *Recorder.*

*December 31.*

The declaration claimed the sum of seventy-five dollars against the defendant, for buying of one John W. Russell in the City of New York on March 31, 1818, three casks of fish oil, which had not been gauged, inspected and branded according to law. The statute which required this of all fish oil sold in the state gave the official gaugers (the plaintiff Maurice being one of them) a penalty of twenty-five dollars for every barrel of the oil not so inspected and branded which any person should buy, sell, barter, ship or convey.

The *Defendant* pleaded that the oil in question was not fish oil, but was whale oil.

The following jurors were ballotted for and sworn: Elijah Curtis, William S. Hick, Augustus Craft, Samuel Dodge, Robert Wiley, Garret Banta, Isaac Underhill, George Niven, William Cruikshanks, Robert Blake, William Wilmerding, Robert McCoubrey.

*Mr. Anthon*<sup>3</sup> and *Mr. Sampson*,<sup>4</sup> for the Plaintiff.

*Mr. Price* and *General Bogardus*, for the Defendant.

<sup>1</sup> *Bibliography.* \*"Is a Whale a Fish? An Accurate Report of the Case of James Maurice against Samuel Judd, tried in the Mayor's Court of the City of New York, on the 30th and 31st of December, 1818; wherein the Above Problem is discussed Theologically, Scholastically and Historically. By William Sampson, Counsellor at Law. Who says a Whale's a Bird?—Sheridan. New York. Printed and Published by C. S. Van Winkle, 101 Greenwich street. 1819."

<sup>2</sup> See 1 Am. St. Tr. 361.

<sup>3</sup> See 2 Am. St. Tr. 541.

<sup>4</sup> See 1. Am. St. Tr. 63.

*Mr. Anthon.* Gentlemen of the Jury: This is a case in which a great deal of science, and, perhaps, much of left-handed wisdom, may be displayed before you. Although from the crowded audience, it is apparent that much amusement is expected from the novel discussions which will necessarily occur in the cause; it still, independent of this matter, involves a grave question, and one of considerable importance to the public.

In all well-ordered communities, where an attempt to deviate from the plain path of honest dealing is detected, the Legislature interferes, and restrains such wanderings by penal statutes. Previous to the passing of the law on which this suit is founded, it had been discovered that great impositions and frauds were practiced in the sale of all kinds of oil; to guard against such practices, the State Legislature, at their last session, passed an act bringing all fish oils under inspection.

While a law is under discussion in the Legislature, all persons falling within its provisions have ample opportunity to be heard on the subject, by petition and otherwise; but when enacted, complaint is in vain in a court of justice, whose duty it is to enforce it. The policy of this law, therefore, which is, as we understand, contested by our opponents, is not, at this time, a fit subject of discussion, and if it was, we trust we should find no difficulty in supporting it.

The statute which you are called upon to enforce against the defendant is, in its nature, remedial, being directed against existing frauds; it must, therefore (as the Court will direct you), receive a liberal interpretation to reach the evil.

This law is a wise law; its object eventually is, to uphold our commercial character, by guarding articles of trade from the contamination of fraud, and in this the character and interest of the nation is essentially concerned.

One of the great questions necessarily arising in the cause will be, what is "fish oil"; whether the oil of a whale is the oil of a fish, and, consequently, whether a whale is a fish?

According to the common understanding and acceptation of men, it would seem, that this could hardly admit of a ques-



tion. It has, however, remained for the great lights of the present age to draw it into serious, grave discussion, and to exclude the whale from the family of fish.

It is fortunate, therefore, for the plaintiff in this cause, that this statute is not to be interpreted according to the refined and learned opinions of naturalists, but that its terms are to receive an interpretation according to their common and popular usage. If, therefore, on this question, naturalists decide against us, and proclaim a whale no fish, we have our appeal to the common sense of a jury to set them right. We shall on this subject be opposed by the eloquence and great learning of a witness, who will be produced before you with much triumph, by the counsel for the defendant, as their great bulwark. This gentleman, we admit, is an ornament to his country, and adorns the science which he possesses, by the amenity of his department and his readiness to extend freely to others the knowledge he has laboriously acquired. I have had the honor and good fortune to enjoy his instructions as his pupil, and from esteem and regard for him must always feel inclined to receive his opinions with great deference and respect. This learned gentleman will tell you that a whale is not a fish, and I am well aware of the grounds on which he will rest that opinion; he will tell you that he breathes the vital air through lungs, that he has warm blood, that the whale copulates *more humano*, that the female brings forth her young alive, and nourishes them at her breasts when brought forth; all these and the like peculiarities we admit to be true, but still the whale remains a fish, until naturalists can show him existing on dry land, and destroy in him the plain discriminating feature between the fish and the rest of the marine creation. Again, it is worthy of remark, that if the whale, by reason of his peculiarities, is to be removed from the finny tribe, the porpoise puts in an equal claim to this distinguished honor, in as much as he enjoys, in common with the whale, all the peculiarities we have just noted. Many of us may not have seen a whale, and might, as to it, be led astray by the learning of philosophers; but the porpoise is an inhabitant of our own

waters, we can judge of his claim for ourselves; and as the porpoise is as much and no more a fish than a whale, in the acceptation of naturalists, we shall all have the demonstration of our own senses to keep us right on this great question.

While we, however, rely ultimately on the decision of common sense, we shall not abandon to our adversaries the field of learning. We shall call to our aid the great fathers of natural science, to combat the visionary theories of modern times. My learned friend, with whom I have the honor to be associated, has now arrayed before you ponderous volumes of recondite learning, and the wisdom of the ancients will be powerfully invoked by him in support of the conclusions of common sense. But, gentlemen, independent of all that learning can urge on this subject, we shall rely on the sacred volume as conclusive. From it we learn that the great division of all created things, fixed by the Deity himself, and which naturalists may mar, but cannot mend, is, the birds of the air, the beasts of the field, and the fish of the sea.

In the first chapter of Genesis it is said:

"26. And God said, let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. 27. So God created man in his own image, in the image of God created he him; male and female created he them. 23. And God blessed them, and God said unto them, Be fruitful and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth."

With such auxiliaries, therefore, we stand forth the advocates of the ancient empire of the whale, which, although fearfully shaken by the efforts of naturalists, we trust will be established by your verdict.

The facts in this cause, gentlemen, are comprised in a very narrow compass, which we shall now proceed to lay before you. We shall bring the defendant fully within the law, by proving that after the passing of the statute which has been read to you, he purchased from Mr. Russell three casks of sperm oil, which oil, at the time of the purchase by the de-

fendant, had not been duly inspected. After proving these simple facts, we shall leave the opening of all the learning of the case to our opponents.

### THE EVIDENCE.

*Richard Ellis.* Served a summons, from a Justices' Court, upon defendant, to answer plaintiff for the same cause as that now on trial. Mr. Judd did not deny that he had bought three casks of oil of Mr. Russell, and that it was uninspected, but insisted that he had incurred no penalty, because it was not fish, but whale oil. The action was dropped below, and a new one brought here.

*Mr. Anthon* proposed to rest the case here for the present that the defendants might open their case and the nature of their defense to the jury.

*Mr. Price* asked whether plaintiff meant to offer no more testimony, as he would in that case, call no witnesses for defendant and move for a nonsuit. But he desired to sum up to the jury upon the testimony of plaintiff, and to have a verdict to bar any further proceedings.

*Mr. Anthon* said that if that was the case, he would give the jury some further information. He had supposed it understood that the question was to be tried fully upon its merits, and not like a game of brag. He would not, however, be stumped, and begged the counsel to wait till he should have a little more evidence to observe upon.

*Mr. Russell.* Sold the three casks of spermaceti oil to defendant on 14th of September; it was not inspected. Spermaceti oil was the oil of a whale,

but not what was called fish oil.

*Cross-examined.* Amongst merchants, sperm oil, whale oil, and fish oil, are known as distinct articles of commerce; and according to the general term of the dealers, and the usual mode of speaking, fish oil does not include, or imply, whale oil. No merchant under an order for fish oil would ever think of delivering sperm oil. There is no trade in this city in whale oil. The vessels belong to the eastward, and come into Sag Harbour with their cargoes. Never knew but two ships come into New York, and as the law applies only to Albany, New York and Troy, do not think it can apply to whale oil, these not being ports used in that trade. Never heard of a whale ship in Albany, nor more than three in New York in fifteen or twenty years. There is an oil called elephant oil, which is of a superior quality to whale oil, and is sometimes used instead of it as a substitute. The various kinds of oil take their names from the animals that produce them, as sperm oil, whale oil, and fish or liver oil. That called winter-strained oil is the best; the finest quality is from the head of the spermaceti whale.

*To Mr. Anthon.* The sea elephant is no whale, and its oil is called elephant oil; once saw a whale along side of the wharf. but do not know whether it is, properly speaking, a fish or not.

There has been whale oil in Albany, though no whale ships. Have dealt in oils fifteen years. Tanners and curriers only use whale oil when they cannot get fish oil. Fish oil comes from the livers of various fish, as cod, haddock, and several others. Sperm oil comes both from the head and the body of the sperm whale. The oil is expressed from the body and the head, and leaves the substance from which candles are made. Have never seen a sea elephant. Do not know how many kinds of whales there are. There has been whale oil at Albany, both sold and used there.

*To General Bogardus.* Never heard of any frauds committed in whale oil, nor any complaints of any. The complaints were of fish oil. You cannot mix water with whale oil no more than fire. Have never seen any sediment, nor water, nor adulteration, in whale oil. Water might be put into the cask, and by that means a fraud committed. The running in the gauging rod would not detect fraud, if there were such; that must be discovered by inspection.

*Captain Preserved Fish.* Have been acquainted with commerce in oils for thirty-three years; was ten years a whaler, and have been master of a vessel in the whale fishery; am of the firm of Fish & Grinnell, and sell both spermaceti, whale, and fish oils, the names by which the oils are known in commerce; no person who wanted whale oil ever made an application for fish oil; it was the universal understanding of all merchants; all the price currents will show it. Fish oil comes from cod, haddock, pollock, sharks, mackerel, and all

kinds of fish. The shark is very productive; its liver will produce several gallons of oil. The livers are taken out and thrown together into a barrel, where they melt into oil. There is always a sediment on this; it is not boiled as the whale is, but merely left to the operation of the sun, so that there is some water and mucilage in all fish oil, and pieces of membrane and shreds of fibres, and for that reason it would boil over as water does. It will nevertheless burn in the lamp. As to sperm oil, the whole of it is from the sperm whale. That called winter strained is the finer part of the manufacture, and that proceeding from the head is the finest. This is called the spermaceti whale. There is another called the right whale, from which comes whale oil; and the hump-back whale, which makes hump-back whale oil. The oil of the whales and porpoises is boiled intensely on board the vessels when it is taken. It is rendered so hot that a drop of moisture will fly off; if you spit on it, it will fly as from hot iron, and if you throw any water it will boil off it, and run over the deck. But the liver oil is only dried by the sun, except sometimes in the fall of the year, when the sun has not power enough. The sperm oil is in the summer strained under a wooded screw in canvas bags, and afterwards undergoes another pressure, making it a cheese, after which it requires no more straining, but is very valuable for the manufacture of candles. Fish oil is sometimes called liver oil, but mostly and commonly fish oil; nine-tenths of the whale oil is

brought into Sag Harbour alone—very little into this port; there are one or two ships only out of this port, belonging to Mr. Hazard. Elephant and seal oil comes from animals caught on the land, and which cannot be come at in the water. (The plaintiff admitted that elephant oil or seal oil were not fish oils.) The universal understanding is for whale oil to be so quoted, that is, distinguished from fish oil. The whale has no one character of a fish, except its living in the water. Whales must breathe the atmospheric air; they may live half or three-quarters of an hour under water, but must then come up to breathe the air again; they would drown in the water, as much as a man would, if they were tied or kept by any means under water. The whale has one character of a fish, that of living and moving in the water. With respect to the fins, they are not strictly fins, but are often called arms (or what you please), on each side; the whalers call them fins.

*Mr. Sampson.* Has it no resemblance to a fish? Very little. If the whale be not like that, can you say any thing to which it is more like? It is very like itself; its tail differs from all other fish; the tail is flat, and it swims like a man. A man swims, as I have observed, by the impulse of his legs and feet; is there no difference then? If it has arms, has it also legs and feet? The arms resemble the arms of a man more than the fins of a fish. Having arms, we would naturally look for the hands—has it any hands? Yes. If so, could it do as I do now (taking a pinch of snuff); can

it breathe with its mouth under water? It can, but not with its nose under water. Do you profess to understand the interior structure of these animals; have they shoulder blades; have they the joints and bones which belong to the upper limbs of a man? Are you acquainted with the terms scapula, humerus, radius, ulna, carpus, postcarpus, phalanges, etc.? Have never dissected any of them. You then maintain that they have hands? I do not. Then you give up the hands, legs, and feet, but still stand out for the arms? No. Do these animals ever come upon dry land? They do not. Is the horizontal tail peculiar to those whales that you describe? Have not the porpoises the same? They have their tail in the same direction. Is the porpoise then a fish? No more than a man is a fish. Please, then, to tell us what it is. A porpoise is a porpoise; they are all of the order of mammalia. From what philosopher do you borrow this classification, and this term of the mammalia? I have my information from the encyclopedia. If so, give me leave to inquire a little about that order, as you call it. Is not the monkey one of it? I do not know; you know more, perhaps, about monkeys than I do. I am not at all so sure of that, but think I can learn a good deal from you. What do you understand by mammalia? Why are they called mammalia? They are called mammalia because they breathe as men do. Man is of that order; he breathes the air, but cannot breathe it under water as fish do. The fish, therefore, has cold blood. A whale's blood

is as warm as a man's; just about the same temperature.

*Thomas Hazard.* Was near thirty years in the whaling business. The oils take their names from the animals that yield them. They distinguish the oil by the creature that produces it. One particular kind of oil is called fish oil, which comes from the liver of fishes, and is therefore sometimes called liver oil. There is, also, elephant oil, spermaceti oil, and whale oil. These names are so determined by usage, that when asked for fish oil, at a time that I had whale oil in abundance, I answered that I had none. All merchants acknowledge these distinctions; the distinction between meal and flour is not more known than that between whale and fish oil, or between wheat and buck wheat. If any one were to order fish oil, and I were to answer by sending him whale oil, it would be the same as if he had ordered sugar and I had sent molasses. Had heard of frauds committed in the fish oil, and much complaint upon that subject. That kind of oil was liable to have water in it, never having been exposed to the action of fire; and the liver oil has been generally sold by the barrel without being gauged, and frauds thereby practiced, there being not only sediment, and sometimes water, but other extraneous substances. The other oils were sold by the gauge. Had known a ship to bring home some barrels with water in them, which was, probably, through carelessness in filling the oil into barrels, where there had been water. Knew of one half-cask that had water in it, but upon

discovery the error was rectified, and heard of another, but never more. Fraud may be practiced in whale oil also, by water in the vessel, or by other mixture, or adulteration, but that can be done just as well after inspection as before.

*The RECORDER.* Is there any such security, then, as to whale oil, as renders it unnecessary to look into it, and see whether it is pure before it is bought and paid for? We generally look at it for ourselves. But the whale oil requires none of the duties of the inspector; nor does the act provide any test for the goodness of the oil; it only speaks of the water or sediment that may be in it; fraud could not happen but by accident or design.

*Mr. Hazard.* It might be mixed if the dealer chose to commit a fraud, or one were practiced without the merchant's knowledge. I have had no such oil since the law passed; but have had forty or fifty barrels of spermaceti inspected, which I submitted to for fear of being sued, being threatened by the inspector with suits. All the dealers in the article, as well as myself, and other people, have that feeling on the subject, and think the law never meant, but was improperly applied to, whale oil. Never knew any thing called fish oil that came from any other part of the fish but the liver. The oil from the porpoise, with the exception of the liver, is called simply porpoise oil. Was lately told by a learned friend, that a whale is not a fish; this is new to me. Do not believe the legislature meant to include whale oil more than olive oil, or any of the oils sent off to the



different sea ports from Sag Harbour. Do not know whether any oil is made from the liver of the whale, nor whether it has a liver.

*Captain Preserved Fish* (recalled). Am not interested in as much as a gallon of oil, further than for burning in my own family. The flounders swim on their sides; the tail is not transverse with respect to the body, but would be perpendicular like that of other fish, if the fish swam perpendicularly, as the others do; but as these fish swim on their side, the tail is in the same position; if they were to swim on their edge, then the tail would appear perpendicular.

*Peter Sharpe*. Was a member of the assembly and chairman of the committee which reported the oil inspection bill.

*Mr. Anthon* called upon the defendant's counsel to state the evidence which he intended to offer by this witness. *General Bogardus* answered that he was called to give an account of the intentions and views of the legislature in passing the bill. The RECORDER directed that the witness should not state the motives of the legislature.

*Mr. Sharpe*. Do not know what actuated other members of the legislature; can only answer for myself and what actuated me. This knowledge originated in the communications I received requiring me to act in furtherance of the law.

*The Plaintiff's Counsel* objected on the ground that it was explaining a statute by parol, and putting to the jury, as a matter of fact, the construction of a statute, which should be out of the words of it.

*General Bogardus* read from 1st Blackstone's Commentaries, page 59, etc., a passage on the construction of statutes.

The RECORDER. What the witness may happen to know as a member of the community, he may state, but not what he knows as a member of the legislature.

*Mr. Sharpe*. A difference has been made between whale and fish oil, and great complaints as to such oils by tradesmen and artisans; it had been sold with water, sediment, blocks of wood, and other matters mixed with or added to it, and all sold by the barrel; it was also said that the barrels were made purposely with heads thick toward the center. Had conversed particularly with Mr. Lee upon the subject, who was well acquainted with it and was the person with whom the law originated. Also received letters from him on the subject while the bill was in progress. In fine, all the knowledge I have is what I obtained from such conversations and correspondence about the time of the origin and pendency of that bill. The act is, according to its title, "For gauging and inspecting of fish oils." Am not sufficiently conversant with the nature of the trade or the material, to say what the application should be, nor have I bestowed any attention upon the question, so as to be able to say whether a whale is a fish, or what else it should be called.

*Mr. Price*. As to the title of the act, although the title says fish oils, the clause which enacts the penalty says, fish oil, in the singular.



*Mr. Sampson.* We mean to observe upon that in due time.

*Dr. Mitchill.\** Among men of business, manufacturers, and artists, and those who prepare the oils, whale and fish oil are understood to be perfectly distinct. There are two sets of men, those who catch the animals, and those who prepare the produce when it comes here for market and consumption. The first know them to be distinct, knowing the animals which produce them, and the latter know them to be different in their nature, their economy and uses. Another class, men of science, understand the distinction upon principles of science, and among them it is received as an incontestible fact in zoology, that a whale is no fish. Into New York much information centers. Men departing from this city circumnavigate the globe, voyaging from the arctic to the antarctic regions. From this class of my fellow citizens, much of the information I possess on this subject has been derived; as a man of science, I say positively, that a whale is no more a fish than a man; nobody pretends to the contrary now-a-days, but lawyers and politicians.

*Mr. Sampson.* Doctor, you have mentioned three classes of men, fishermen, artisans, and men of science. There is a much larger class, those who neither fish, manufacture, nor philosophize; have you ever thought it worth while to pay attention to their opinion? The great bulk of mankind that speaks English would call a whale a fish, and they would say the same of a crab or a clam and with them I would not dispute the question. If I was to go into the market amongst my Long Island friends, I would not debate the question whether the lobster were a fish or a crustaceous animal, or whether a clam were a shell fish or a mollusca. The legislature, to the honor of our democracy, consists of all classes of men. It is one of the felicities of our form of government, that all classes are represented.

*Mr. Sampson.* Will you state the characters which distinguish whale from fish? I will contrast those characters with the characters peculiar to fish. A fish is an inhabitant of the water that breathes by gills, and not by lungs, and does not come to the surface to breathe the atmospheric air, which is superincum-

\* MITCHILL, Samuel Latham. (1764-1831.) Born North Hempstead, N. Y. Graduated Edinburgh 1786. Member New York Legislature 1792-1797. Member of Congress 1801-1804, 1810-1813. United States Senator 1804-1809. Professor of Natural History and Chemistry Columbia College 1792-1801, 1808-1820. Professor of Botany and Materia Medica 1820. Vice-President Queen's (Rutger's) College 1826-1830. Founder and Editor "Medical Register." Founder New York Deaf and Dumb Institution, New York Library and Philosophical Society, and Lyceum of Natural History. Physician New York State Hospital for 20 years and Surgeon General of the State Militia. "He was one of the most gifted and versatile men that New York State has produced. His contributions to science in every domain of which he made research were recognized by both continents."

bent upon the watery deep. Fish take in the air commingled with water, through their gills, in the proportion the Creator has thought suitable to their nature and economy. From its breathing the air commingled with water, the fish is cold blooded, and feels cold to the touch, and is little, if at all, warmer than the element in which it lives; nor can it ever become warmer during its life. The greatest exercise cannot warm it as it does us. The whale, on the contrary, is a hot-blooded animal, like ourselves.

The RECORDER. The first distinctive character then is, doctor, that all fish breathe through the gills air commingled with water, and that the whale breathes by lungs the atmospheric air? Yes, sir, such is the economy of Providence. Again; the cetaceous tribe called whales, (a broad generic term, taking in the whole family,) suckle their young; the females of fish do not give suck. The cetaceous order are mammiferous, and suckle their young by their teats.

Mr. Sampson. Pray, doctor, may I ask you for the etymological meaning of the term cetaceous? Is it not from the Greek? Theologically and scholastically speaking, the word means whales and all their tribe. It means, in its most extended use, all huge and large inhabitants of the deep. It comes, I think, from the Greek verb *κειμαι*? It does, because it lies like a huge floating rock. This Greek verb expresses that action, which is called in English, lying, a word of double meaning, (philologically speak-

ing;) the difficulty is, how to apply it to the philosophy of floating rocks, which is of some novelty, and smells of the modern school? You should do as Sir Joshua Reynolds did, wear a trumpet at your ear, and then I should not be cut short or interrupted. I was going to say, that this great animal, lying at the top of the water resembled a large floating mass. Permit me then, doctor, with due respect, to ask this question; admitting that *κειμαι* means *jaceo*, and *jaceo* means to lie like a great mass; where is the authority that this great mass must needs be a whale; and, again, that this great whale may not be a fish? If I must give you an authority, I will refer you to Saint Jerome's Latin vulgate of the Bible, in the first chapter of Genesis. Now that I am on the subject, I will give an account of the fifth day's work of the creation, and show from thence that the formation of whales was a distinct exertion of the creative power from the creation of fishes. In the first chapter of Genesis, we are told, that God created fish, and afterwards that he created great whales, 20th and 24th verses.

Mr. Sampson. I do not find, doctor, that the word fish is there used as having been created before or after the great whales? The word fish may not be used, but the inference is obvious. Your conclusion, however, is not so obvious to my sense, but that there will be room enough for comment when it comes to my turn.

The COURT. You think, sir, that on the fifth day these large cetaceous animals were formed

by a distinct exertion of Divine power, and were of a distinct formation? I do. It was a distinct creation by the Almighty power after he had created the other marine animals, although all were made on the same day. I mean to say, that from this it may be implied, that the cete was a distinct creature, and so the able writer of that chapter has described it; and a great man he was. He knew the difference between a whale and a fish. It is a luminous text, and displays great learning, and throws great light upon this subject. The author is not minute in his relation till he comes to the creation of man; then he is precise and particular. The whole account is an immortal composition. The learned counsel, if he disputes this, will be driven to maintain that all fish are great whales; for if he cannot find the creation of fish in the 20th verse, he will not find it in the succeeding one, where nothing is said of fish, but where the creation of whales is distinctly and positively expressed.

Fish are oviparous with very few exceptions. They lay eggs, which are impregnated and hatched out of the body of the female. Their mode of propagation is delicately and classically expressed by the poetical phrase *castum amorem piscium*. The male fish is called the milter, the female the spawner, but they have no external organs of generation; the male has no *penis intrans*, nor is the female formed for lascivious embraces.

The next character of fish is the perpendicularity of the tail, already discussed by Mr. Fish. He stated correctly, that all fish

have perpendicular tails, and are thereby to be distinguished from the cetaceous animals, which have them in a transverse position. The reason why the flounder family, of which the halibut is the chief, have the tails apparently flat, is, that they swim on one side; but they are, in their organization, fish, and have a fin which balances their tail.

*Mr. Sampson.* Is it known, sir, what the motive of that family is for following so odd a humour? Is it out of pride to look like whales; or is it a law of their nature, by which they are compelled to that action? It is an extraordinary provision, and a constant law of their nature. But if they could go upon their edge, as Mr. Fish has shown, they would have their tails in the same position as all the rest of the finny tribe called fish. They would, nevertheless, if they took the fancy to play the antic in that manner, astonish the other natives of the deep, as they would present two sides of two different colors, a white and a brown; as Captain Fish might say, the starboard side white, and the larboard side mud color? And how would their eyes appear? Would they not have a little of a squint? It is true the two eyes would be on the one side. Then the white side would see nothing, and some designing fish would take them by the blind side? The eyes are not quite in the middle. It seems to me, that the peculiarities of this creature would warrant an enterprising zoologist to create a new class, or order at least; there seems nothing wanting but a Greek term? We have

a name already for them, they are called Pleuronectes.

*Dr. Mitchill.* The next distinguishing character is the structure of the heart; fish have but one ventricle and one auricle; but the cetaceous tribe have the heart double, like men and quadrupeds, and, as a consequence of this, alternate respiration. The next is, that while the liver of fish is of so remarkable a texture, that upon exposure to air it dissolves into oil, instead of rapidly putrefying as the liver of quadrupeds does, this organ in the whale does not undergo this change into oil, but speedily exhibits a foul mass of corruption. Fishes livers, when thrown by the sailors on the deck, change into grease, and are used as an article of profit. The sound or swimming bladder of the cod, makes an excellent article of diet; and with this and the tongue, the good Calvinists of New England furnish their Catholic brethren of the south of Europe, with provision for their meagre days, and in return, procure their brandies, fruits and wines. The liver, under atmospheric influence, goes into oil, and the frauds in that species of oil were the true ground and foundation of the inspection law. Have never heard of oil from a whale's liver, more than from a bullock's liver; fish have fins with rays, which the whales have not.

*Mr. Anthon.* Fins, then, are common to both. You have, I think, classed the fishes of New York in your late valuable works, by those members. Is not this, then, rather a point of agreement than of difference?

The fins of the whale are of a peculiar structure. Mr. Fish has described them as resembling hands and arms; are we to take this at the letter; if so, they will have the same bones and articulations as human creatures in their superior extremities? All those are found in the cetaceous animals. If, then, they are provided with hands and arms, it is natural to expect fingers and thumbs. How is it as to the *carpus*, *metacarpus*, and *phalanges*; are they present; if so, could they use them for ordinary purposes, as to thread a needle or do this (taking a pinch of snuff)? These extremities are covered with a membrane or web. Like people that wear mittens. No wonder they are awkward, and all their fingers like thumbs, as the saying goes. Their arms are, nevertheless, pretty fully developed, and in one of the cetaceous kind called the manati, so much so as to enable it to take its baby in its arms and carry it on shore, thus (using a significant gesture). The females of this family wear whiskers. She is then sometimes a wet nurse and sometimes a dry nurse, or an amphibious nurse; in zoology, the whiskered lady? There are, according to modern naturalists, two kinds of cetaceous animals, one which grazes, and the other which lives altogether in the deep. May I be bold to ask, sir, whom we are to understand by the modern naturalists? I should say, principally, the French school; and for instances, I would give you Cuvier and La Mark. It appears to me, that much of the difference between the ancients and moderns con-

sists in the latter giving new names to old things. Your description of the manati seems to justify Berosus, the Chaldean antiquary, who lived in the time of Alexander the Great, as you know, in what he relates of Oannes, who came daily out of the Red Sea with a man's head under his fish's head, man's legs under his fish's tail, and man's hands under his fins, which might mean no more than the intelligence of the being the coalition of his posterior extremities in the tail, and the confinement of his fingers and thumbs by the web or membrane. The only difficulty is, then, how such a cetaceous person could teach astrology and ichthyology, or use letters? I must differ from you and your authorities upon the subject of Oannes. I consider him to have been an Indian philosopher who came by the Red Sea, and taught philosophy, and that he was neither a manati nor a whale, but that in landing he got wet. \*

*Mr. Sampson.* Yet Berosus, in the Greek versions, is made to call him ζῶοναφάνευον, (an irrational animal), a term ill applied to any professor of philosophy, either wet or dry. Your opinion that he came from the Indians is strengthened, I must confess, by recurrence to the Syriac word which, as may be seen by Sir Isaac Newton's Chronology, means a foreigner or traveler. I shall, for more certainty, doctor, write the word under your inspection

(which he did). These were, you know, various names, if not different persons—Oannes, Anedotes, and Euhannes; and Halodius calls this same person Oes, and says he was a man dressed in fish's skin. The root Ωο'υ is found in all those words, as if he had proceeded from the primogenial egg. Abydenus makes a second Anedotes, resembling the first, appear in the reign of Amilacus of Sephar, or Pantabibla; Apollodorus brings him under Amenon, forty sari later; Polyhister has not escaped censure for bringing him too soon. Am I right? I have no right to dissent. Have any other works of Oannes reached posterity, except that one on Cosmogony, and that other on Political Economy? I know of no other. It is likely, then, that he was neither a demigod, as some say, nor a monster, as others would have it, but that the truth lay between, and that he was a philosopher? Yes. In his Cosmogony he mentions sea monsters (doubtless not considering himself one), which were kept by a governess called Omoroka, till Belus cut her in two, and made sky of her head, and earth of her more material part? Go on, sir, I am all attention. This Bel, I take it, was their Jupiter; this allegory meant the cutting the darkness in the midst, dividing the earth from the sky and the waters, and reducing the world to order? Proceed, sir. So far, allowing for superstition, the Chaldeans

\*Shakespeare seems to have borrowed his Caliban from this Chaldean type, when he makes Stephano discover his friend Trinculo, under the monster's gabardine, and exclaim, "if any be Trinculo's legs, these be they."

agreed with the Hebrews. This word, or thalitutho, (in the Chaldean) moisture, resembles so much the Greek *thalassa*, the sea, as to make some suspect interpolation? I do not know. Have you present in your recollection, doctor, the ninth book of Pliny's *Historia Mundi*, wherein he treats of the strange creatures in the Indian seas, or *De Bel-luis in Indico Mari Repertis*? I have looked into Pliny, but I cannot trust to my memory. Does it not appear from the writings of Pliny, that he knew the nature of the whale as well as the philosophers of this day? I do not think he did. As to its mode of breathing and organs of respiration? I think anybody might know that. Yet neither he, nor Aristotle, nor any other of the ancients, ever inferred from thence that the whale was not a fish? Very possibly; they were not so fully informed. I do not find that the modern philosophers agree as respects the system of Linnæus; almost every one rejects some part, and substitutes or adds something of his own. Is this so? They are, then, the more like lawyers, if they do not agree. But a whale has been known not to be a fish since the writing of the book of Genesis, which is 4004 years plus 1818; and now-a-days, it is nowhere denied, except in courts of justice and halls of legislature. I am sorry, doctor, to be obliged to differ, and to deny that position. No doubt you are bound to do so, sir. That is your side of the question. I think the Greeks, and those conversant with the Greek language, and

who have expounded it, are of my side, and that the word *ζῆτος*, which you say means a great monster that lies upon the deep, means a whale fish? You should have brought your *Scapula* with you. Is not Schrevelius a good authority for the meaning of a Greek word? Very good; what does he say?

*Mr. Sampson.* I refer to the word *ζῆτος*, in the *Lexicon*, and its derivative, *ζητεία*, where the former word is rendered in Latin by *balaena* (whale), and the latter, "*locus ubi hi pisces capiuntur.*" (The place where these fish are taken, or whale fishery.) Well, I give you my reading. The word comes from *ζειμαί*, *jaceo* (I lie), and means accordingly, any great floating mass of matter, appearing as a rock does above water. The compiler may have adopted whale fishery, being a word in common use, to avoid greater error or misunderstanding; but we understand the business of whales as much better than the Greeks, as we do that of political economy. If that be so, the gentleman opposed to us had better petition the legislature for a law, declaring that a whale is not a fish, anything in Aristotle, Pliny, the voice of the multitude, or in the Scripture, to the contrary notwithstanding? We must follow such course till there is a better. You have referred, doctor, to Moses; do you find anything there to justify this class *mammalia*, as separating whales from fish? No, sir, Linnæus first understood classification. Aristotle reduced all animals to two classes, those with, and those without blood; and Pliny's divisions were *homo*,



*terrestria, aquatilia, and insecta*; neither making the distinction you contend for? I must now appeal to the court, whether I am to be catechised and questioned like a college candidate.

*Mr. Sampson.* I am sorry the witness should think this appeal necessary. No man can have more respect and deference for his learning, and other qualities, than I have; but I am upon duty like a sentinel, bound to challenge every witness, and not let King or Kaiser pass, till he advance the parol, and give the countersign. The doctor, I am sure, will pardon me.

The RECORDER. In courts of justice, the freedom of speech, and latitude of inquiry, is not the privilege of the individual, but of the community; and has, therefore, been always pretty liberally allowed. And though a witness of superior learning, or skill, is called to speak as to matters of opinion, the other party is permitted to inquire into the grounds of that opinion. The great and merited standing of the witness, and his high character for learning and wisdom, may justify the anxiety of the counsel; and such a witness loses nothing of his dignity in submitting to the common course.

*Dr. Mitchill.* Then, may it please the court, I am here like a thirsty soul, ready to drink of the knowledge that flows so copiously from so many learned sources.

*Mr. Sampson.* This is kind and encouraging, sir. But it is for me to be thankful for the instruction I receive. Linnæus's classes are, I think, *Mammalia, aves, pisces, amphibia, insecta,*

and *vermes*? They are so. Indulge me a little further. The *mammalia*, or those having *mammæ*, or teats, are subdivided into seven orders. *Primates, bruta, ferae, glires, pecora, belluæ*, and *cetae*? It is even so. The first of these orders, called *primates*, contains four genera: *homo, simia, lemur*, and *vespertilio*; that is, man, monkey, macauro, and bat. Is not this the arrangement of Linnæus? The learned counsel is right. Now, is not man strangely mated or matched, when the whale and porpoise are his second cousins, and the monkey and bat his Germans? Other gentlemen may choose their company, I am determined to cut the connection.

Have not many creatures been discovered since Linnæus wrote; as, the mammoth, known only by its fossil remains; the camel leopard, long thought fabulous; to which might be added, the sea serpent, and a novel creature of no small importance in the scheme, the modern Hoppocentaur, or Kentucky-man, with others, that had they been known, which might have served as connecting links, and prevented such grotesque associations and abrupt transitions; also, touching the forced and incongruous grouping of animals every way dissimilar, in the same order; as, in the order *feræ*, or wild beasts, the lion, the seal, the hedgehog, and the mole; in that of *belluæ*, the rhinoceros and the pig; the great elephant, and the little ant-eater, all together in the order called *bruta*? Probably so. There is a creature of which you have treated, I think, in your first number of the new series of



your Medical Repository, called the Kraken. Are we to give faith to Pantoppidan in what he says of its being a scœpia or cuttlefish, of a mile and a half in diameter? Pliny, in his treatise *de belluis in indico mari* mentions such a fish, but only gives it four acres of extent, yet his relation has been thought marvellous and fabulous; what are we to believe? That, sir, is the most prodigious monster of the ocean. The whale feeds upon him. That is surprising, and against the usual course; the greater fish commonly devour the smaller. I should think the whale could merely nibble at him? A hungry whale has been known to bite off one of his huge paws or tentacula, as large as the mast of a ship, and make a meal of it. This was not one of the edendatæ, or toothless whales? It was a large sperm whale. If I have not forgot what I once read in your Medical Repository touching this animal, it amounts to this: That in the first six editions of Linnæus's *systema naturæ*, it was placed amongst the *mollusca*, till Bomare and Banks rejected it altogether as fabulous. That *Ulissee Aldrovandus*, and *Ambrosinus*, were, if I recollect your very phrase, awed to silence, but that Mumfort came forwards with proofs of its existence? This quotation is substantially correct. The only thing I shall now request from your indulgence, is to know to what class, order and genus this prodigious creature properly belongs, according to the modern classification; if it be the same that Pliny described as being four acres in extent, *quaternum*

*jugerum*, and is the same as the kraken, which is said to be a cuttle fish, and which Linnæus classes with the worms, vermes? There is a little fish that comes to our market, called the squid, which avoids its pursuers by shedding a black liquid, and so concealing itself; that is one of the same species.

*Mr. Sampson.* But this great animal is of the class of vermes or worms?

*Mr. Price* objected to this minute kind of inquiry.

*Mr. Sampson* replied, that possibly his curiosity might have carried him too far, for that a worm of four acres was enough to surprise any one; it made his hair stand on end but to think of it; the more so, as the great worm is the name by which the poet Dante designates the devil.

*Mr. Sampson* proceeded to inquire as to the following points: whether the kraken had not been variously classed, first with the vermes or worms, consequently, with the oyster; secondly, with the crustacea, and whether the latter would not necessarily associate it with the lobster, the scorpion, the pediculus or louse, and likewise with the flea.

*Dr. Mitchill.* The lobster, in the new zoology, is a crustaceous, and the oyster a molluscous animal.

*Mr. Price* protested against this mode of examining a witness of Doctor Mitchill's high standing and dignity of character, by questions so minute and trifling, and without any bearing upon the subject. He hoped the counsel would not be permitted to sport and play with a

person so respectable and estimable, in a manner both useless and oppressive.

*Mr. Sampson.* If my questions were useless or trifling, they could not be more gratuitous than an argument in support of the personal dignity of Doctor Mitchill, a man not so easily oppressed; one armed at all points, whose knowledge and promptness rendered him more powerful to oppress, if he were so disposed, than vulnerable to attack; insomuch, that nothing could depreciate him but the idea that his dignity required to be bolstered, and was not able to take care of itself. I know Doctor Mitchill well, which is no more than to say, I honor and esteem him. He has favoured me with his friendship, and never entered my door but with pleasure and instruction in his train. To assail the weak is cowardice and cruelty; it is because he is confessedly a great man, that I stand upon the *qui vive*. The manner in which he has treated the law and the lawyers, considering his might and his weight, makes it as much self defence, as it would be to try to turn an elephant out of your garden where he would trample everything under his feet. All that great men do is great; among other things, they make great mistakes, and their mistakes are more dangerous, as their sway is great. And their opinions are the fittest to be opposed or collated with each other. If I can show the errors of Linnæus by the testimony of Doctor Mitchill, and so reconcile to the scriptures, to the common law, to common sense, common speech, and the com-

mon consent of mankind, this modern philosophy, it is, I think, as useful an investigation as can be undertaken. If this may not be done, it were better so much of that philosophy as is in defiance of all these, should be critically examined into. At all events, the defence of Doctor Mitchill's respectability, must ever be a work of supererogation.

*Dr. Mitchill.* I have listened with admiration, and wondered how the counsel had been able to add to so much legal lore so great a body of science. Generally speaking, the latest works of science were the best, as embodying the information of all predecessors, and leading to a correct summary of all prior information; and he that would at this day trust to the classical authors on zoology, would do as ill as one who, pursuing the longitude, would trust to Kepler, and the mathematicians that preceded Lord Napier, to the exclusion of those who enjoyed the invention of his tables of logarithms, and the other great improvements in the exact sciences. The difficulties of classification are great, requiring judgment; research, patience, and acumen. The necessities and difficulties are alike known to scientific men, and these difficulties are not aided by obscure references to the obsolete and antiquated doctrines of Aristotle, Pliny, Oannes, or Sanconiathon. The labors of necessary classification are to be painfully pursued, and lead to infinite, and sometimes to microscopic researches, even amongst insects filthy to the touch, and disgusting to the sense. With-

out methodical classification, and appropriate nomenclature, the study of the vast variety of nature's productions would be barren and impracticable. The great Linnæus knew this, and, like a second creator, brought order out of chaos. His system is not perfect, neither can it be said to have been abolished, any more than the altering this hall by shifting the benches, or changing the doors, would be the destruction of the fabric.

*Mr. Sampson.* Doctor, I respectfully and thankfully take my leave; you are now *solutus legibus*.

*James Reeves.* Have made three whaling voyages, and have seen the spermaceti whale fished and cut up. Formerly, in my days, there were three places from which whale ships sailed, Hudson, Halifax and Nantucket. When we hailed vessels, we asked what luck or what success; the answer was, one, two, or three hundred barrels, and sometimes one, two, or three fish. The oil was named from the fish, as black fish, hump-back, and whale oil. The spermaceti oil was called spermaceti. I never heard any distinction between fish oil and whale oil, as talked of here today, but always thought that fish oil included them all. The sperm oil was called from the sperm whale, the whale oil from the right whale, and black fish oil from the black fish, a small whale which yields about three barrels; this last kind of oil has the nearest resemblance to the spermaceti. It is a fact, within my own knowledge, that the dog fish brings forth its young alive; have seen it pup in a

boat. The word was common, that the whale calved, and the fish pupped.

*Mr. Anthon.* Is the dog fish a whale, or like a whale? Not the least; it keeps to the ground, and does not come up to breathe like the whale. How does it carry its tail, upright or flat? Its tail stands up and down; it breathes under the water. The whale breathes under water. There is a hump, or hole, in the back of the head, where the water lodges till the animal comes up to empty it by spouting it out.

*Cross-examined.* If I were asked for fish oil, my answer would be, what kind of fish oil do you want? Before this afternoon, I should have said, that whale oil was fish oil; and even after this trial, I think I should still ask the question. Yesterday, I am sure, if you had sent me for fish oil, I should not have thought of any distinction except the spermaceti, which is distinguished, because it costs the most.

The RECORDER. Then before this trial you would not have given spermaceti for fish oil, and now you would have doubts? It's no wonder if any man should have his doubts; I never had any before; I as much thought a whale was a fish from its swimming in the water, as that I was a man from living out of it.

*Gideon Lee.* I deal in hides, skins, leather, oil &c.; am interested in several tanneries, and carry on the currying business. Principally I deal in liver oil, but in the absence of this, as was the case during the late war, the curriers used every

kind of oil drawn from marine animals, and I have known them to use not only animal, but vegetable oils; still, we greatly prefer the cod liver oil. Have discovered extensive adulterations and mixtures on these oils, such as water, tar, dirt, foots, or dregs; I would not call them all frauds, some might have been the result of accident. It is very difficult to detect them; oils are frequently offered for sale in the vessels which bring them to market; and in some cases we can only examine a few casks of the uppermost tier, and these are sometimes bunged up in such a manner with long bungs, that we are unable to extract them with the ordinary instruments used; besides, several kinds of oil are so condensed or congealed in the cold season, that the inspector with all his means and implements for guaging and examining, finds it difficult to determine the quantity of extraneous matter. Remember having purchased a parcel of liver oil, one barrel of which contained but two gallons of oil, the residue water; and some years ago, I purchased a parcel of whale oil of plaintiff (who then acted as a broker and had not examined it), one cask of which contained not more than two or three gallons of oil, the residue of its contents being foots or sediment. Have not dealt much in the different kinds of whale oil, but should say that it was much less adulterated than the liver oil; however, I conceive, that all kinds of oil require inspection.

We use the general term, fish, to comprehend all marine oil; a less general phrase is whale

oil; of this there are several species, as sperm, humpback, common whale, &c. We have also sea elephant oil and porpoise oil. Another class of fish yield oil from the livers only, such are the cod, haddock, pollock, &c.; this we call liver oil; there is also dog and manhaden oil; sometimes we use the phrase, shore oil; this is a mixture of different oils taken on our coasts; have heard the fishermen apply the term, ground fish, to such as grovel on the bottom, in contradistinction to those fish that rise to the surface of the water for the purpose of breathing. By we I mean plain men, who carry on the substantial business of this great world, and however naturalists have made other distinctions and classifications for other purposes, we disregard them. We call all marine animals fish, and land animals quadrupeds.

*Mr. Anthon.* You have heard the testimony as to the commercial terms or names of oil, how do you understand them? I have; I was in court this morning, and finding that my testimony in this particular would contradict that of some worthy and respectable citizens.

*Mr. Price.* Do you mean to say, "contradict?" I do mean to say, that my testimony will be directly opposed to theirs; finding such must be the case, and to remove the possibility of mistake on my part, I returned home, and caused my clerks to examine the papers of several years' transactions in oils, such as entries, receipts, invoices, bills of lading, and bills of parcels, and we have not been able,

in any one instance, to find the phrase, fish oil, used; nor do I find it in any correspondence, price-current, or circular, domestic or foreign, applied to curriers' oil, or used in any case as a specific term; but I do find it in some of these used in a general sense, that is, embracing all kinds of oils drawn from marine animals; and to support myself I have brought these documents into court.

*Mr. Anthon.* Did you draft the bill under which this prosecution was brought? I did. In what sense did you use the phrase, *fish oils*, at that time?

*Mr. Price* objected to this kind of evidence. The objection was sustained by the COURT.

*Mr. Reeves.* In Boston my dealings are limited to one house, and that house is probably the largest dealer in America; but I have purchased elsewhere, and of various persons. Have you discovered adulterations in sperm oil? Few articles are so difficult to examine as oils. If I were obliged to examine personally all the oil I buy, I would not deal in the article. The inspector has implements to facilitate his examination, and his time is worth less than mine.

*Mr. Price.* Suppose you had an order for fish oil, would you send whale oil? I would first try to ascertain what kind of fish oil was wanted. I wish your direct, unqualified answer; suppose your correspondent orders 50 barrels of fish oil, would you not send him curriers' oil. If he were a currier, or I was aware that he knew I seldom dealt in any other than liver oil, I presume I should send such. You would not send him sperm

oil? Under such circumstances I should not be likely to do so. Suppose I should contract with you to deliver me a quantity of fish oil at a stipulated price, would you deliver sperm oil? I would deliver you the very cheapest kind of fish oil that I could find in market, presuming you understood your business. Then you would not deliver sperm oil? Certainly not, sperm oil generally bears the highest price of all. Are you an eastern man? No. I thought you came from Massachusetts? I did. So then you are a Massachusetts man, and not an eastern man? Such is the fact; I am a northern man, having come from a place called Worthington, 53 miles from Albany.

*Jacob Lorillard.* Have been a tanner for about fourteen or fifteen years; the best oil for dressing leather is from the livers of cod fish, most frequently called liver oil. Other oil is, on many occasions, used; often the oil used is made up of various kinds of fish. Sometimes we use whale oil, sometimes elephant oil, but all are called fish oil. Could not say what meaning I would give to a letter ordering fish oil, without some specification. Have not dealt so much in whale oil as to know of all, or any great part of the deceptions that have been practised; but from what I do know, think it very desirable that it should be inspected.

The manhaden oil is made from the body of the fish. The term, fish oil, is too general to be applied to liver oil distinctly, though it may have been oftener applied to such oil than to that of whales. If I ordered fish oil

in general, I would have no right to complain of receiving liver oil, as well, because the term used, would warrant the seller in supposing that intention; my mode of dealing would not be his only reason for thinking it right, the generality of the term would also have its weight. The manhaden oil is made of the body, not the liver of the animal, and yet it is called fish oil. Before this afternoon, I had never understood that the term fish oil was mentioned in any price current to distinguish cod liver oil. But hearing it testified in court that European price currents made a distinction between fish oil and whale oil, appropriating the term fish oil to cod liver oil only, I went home and searched considerably, but could not find one where such distinction was to be found. Entirely agree with Mr. Lee, that fish oil embraces every species of marine oil; consider that the understanding of the trade.

*Israel Corse.* Am a tanner; heard the testimony of the former witnesses, and confirm it. Have been imposed upon, by whale oil sold with water in the barrels. Believe that the eastern people made some distinctions about fish oils. It is not known to the southward, or anywhere but to the eastward. Once found in one barrel eleven gallons of clear water. It was not in the power of any one to detect such a deception by sounding; the rod would be greasy by passing through the oil on the surface and resist the water below, so that it would appear when pulled up as if it had only passed through oil. Though I

believe any dealer in New York would rather send me liver oil, under my order for fish oil; yet, if it was a stranger knowing nothing of my trade, or business, suppose he would be as likely to send whale, as any other oil. Have different names for the fish when we go into particulars, but fish oil, in the general sense, embraces the whole of the marine oils.

*Ralph Duncan.* One day when plaintiff was inspecting some barrels of whale oil, some person tapped him on the shoulder, and asked him if he had been inspecting fish oil, and he answered, no; but afterwards, looking up and correcting himself, said, yes. Am a guager, and before this act all fish oil was guaged, but never whale oil; know very little about oils, having only assisted Mr. Maurice, the plaintiff, about two months. The guaging had nothing to do with the frauds. As to the distinction in the name of liver and whale oil, the merchants who brought the oil make some such distinction, but they are mostly eastern men. Know nothing of oils myself; am a bookkeeper.

*William Hall.* Am a tanner; always made a distinction between fish oil and sperm oil. The whale, or sperm, is called train or body oil.

*Thomas Brooks.* Never bought whale oil. If I were to send for fish oil, a merchant would know what to send me, because it was known, from the trade I follow, what article was most suitable. Different people have different ideas, but if I was to send to an entire stranger for fish oil, he



might very fairly send me whale oil.

*Hugh McCormick.* Fish oil means all sorts of marine oil; have been twenty years a tanner, and have known of deceptions and frauds in whale oil; think it requires inspection to put an end to them. Had never purchased much whale oil; could not say how much, or if more than 20 barrels in four years; found sediment and mixtures of worthless unmerchantable matters in it, and water. The whale oil may be used for leather when mixed with other fish oil.

*Losee Van Ostrand.* Am a leather dealer and currier; considered the word, fish oil, as meaning every kind of marine oil. If no liver to be had, they used the others, whale and all mixed together; strained oil is called fish oil; there is a difference made between cod liver oil, and fish oil of other fishes' livers, but the general word, fish oil, embraces all.

*Borden Chase.* Deal in the commission line in oil and candles; have known water in casks of whale oil; it might possibly be by accident, and not fraud; never knew any of it in sperm oil; considered the whale oil as distinct from fish

oil; have lived seven years to the eastward.

*Wm. D. Morgan.* Am assistant to the plaintiff; know of frauds committed in the sales of oil; one vessel which I inspected contained 110 gallons, 93 of which were occupied with water, the remainder only with oil. Inspected another for Stephen Hattaway, when there was a deception of like nature, and in many others found water from three to five gallons, and upwards.

*Mr. Comstock.* Was well acquainted with the article for 20 years. Commercial men conversant with the trade always make the distinction between whale and fish oil. The experience of the tanners does not extend beyond what they themselves use in their particular business. Yesterday a gentleman applied to me, wanting fish oil for the European market; told him we had none, but told him that if either sperm, or humpback, or right whale oil, would do, I could serve him, but he said that would not do; it was fish oil he wanted; have resided nine years in this city, but formerly lived at Nantucket, where they are more acquainted with whale than fish oil.

*December 31.*

*Mr. Sampson* stated that he had many books to refer to, some were authorities of law, others works of science. It was, of course, the right of defendant's counsel before summing up, to know what they were, and to what points they were to be cited. But as many of them would be not otherwise read or referred to, than as part of his speech in summing up, and only so much of them as the arguments of the opposite counsel might render necessary, he submitted to the Court, and



the counsel themselves, whether he should take up time by reading them in advance.

*Mr. Price* insisted upon it as his right to be apprised of whatever was to be used as authority against him.

The RECORDER intimated an opinion to that effect.

*Mr. Sampson* said he would cherfully comply, as a controversy of this nature could not be managed with too much candor and mutual concession. To show that the ancients were acquainted with the economy of the whale, and other cetaceous animals, he referred to the ninth book of Pliny's *Historia Mundi*, and specifically to the following chapters: Touching their bony skeleton, and that certain of them go ashore to graze, ch. 3 and 7. Touching their spouting columns of water as high as the masts of a ship, ch. 4 and ch. 6. That they breathed, and had no gills, but lungs, and particularly their spiracula, or air holes, in the skulls, ch. 7. As to their being viviparous, and suckling their young, ch. 8, observing, that in quoting Pliny, he quoted all the ancients, he being the classical epitomist of Aristotle, Theophrastus, Pythagorus, Apollodorus, Hippocrates, and the whole of the medical writers, and philosophical poets, who preceded him. To prove that as Linnæus had overturned the systems of Artedi and his predecessors, so the names of the sectarians who have since founded other systems, or new modelled his, would fill a catalogue, he referred to the article classification, in Rees' *Cyclopædia*; and to show that professed naturalists still call a whale a fish, he cited the same work under the word fishing, compiled from the best authors, the article whale or Greenland fishery. "This huge fish is chiefly caught in the North Sea." "The first persons employed in this fishery, seem to have been the Norwegians; for we find that King Alfred received information from Oether, a Norwegian, in 887 or 890, that the Norwegians were employed in this fishing. 'Several men stand upon the fish with iron calkers or spurs to prevent their slipping, and when all the blubber is cut from the belly of the fish, it is turned on one side,' etc." And under the subdivision "fishing, the art or act of catching fish." "Fishing is

distinguished with regard to its object, into that performed in salt water, and that in fresh. The first practiced for whales and other sea fish, etc.” That this was the commonly received opinion, he referred to several of the most respectable compilers for the use of schools, and the instruction of youth, and principally to Bigland’s Letters on Natural History, where it is said, “fishes are generally divided into the cetaceous, or whale kind,” see p. 372, and pp. 374, 376, to the same effect. And Goldsmith’s Animated Nature, Vol. 5, ch. 1, p. 2: “Our philosophers hitherto, have been employed in increasing their catalogues, and the reader, instead of observations or facts, is presented with a long list of names, that disgust him with their barren superfluity, and to see the language of science increasing, when there is nothing to repay the tax upon his memory.” And to the second chapter of this volume, which he devotes to the “cetaceous fish called whales.”

The sentiments of that great master genius, Buffon, as to the evils of burthensome nomenclatures, and tiresome minutiae, are known to every one, and may be found in the introduction to his Natural History. And he referred to the writings of Pennant generally, to show that he followed Ray and Willoughby, and rejected the classification of Linnæus, as Linnæus had overturned the system of Artedi.

To prove that the common and statute laws of England recognized the whale not only as a fish, but a most especial fish, and by pre-eminence a royal fish, and by the name of royal fish, dedicated it to the king and queen by several moieties, as part of their respective royal revenue in a peculiar manner, he referred to Plowd. Com. folio 315, 316, where, in a case between Elizabeth and the Earl of Northumberland, the queen claimed a mine of copper, gold, and silver, in the earl’s land, as a royalty amongst the things belonging *jure coronæ* to the King, as part of his royal revenue, and amongst other items, is enumerated this royal fish. And also to Fleta, to show the peculiar allotment of the sturgeon and the whale as being royal fish. Cap. 45. *De Sturgione aliter, observitur quod res illem integrum habebit propter privilegium regale.*

Cap. 46. *De Balæni. De balæna vero sufficit si rex habeat corpuset regina caudam.* He also referred to the *aurum reginum* of William Prynne, 127, to show that this was so at the common law before the statute *de prerogativa regis*. For the rest, to avoid tediousness, whatever he had occasion to refer to, should be taken as a matter of general notoriety, to avail as it might. Perhaps he should not find it necessary to resort to any others, or even to these already quoted.<sup>5</sup>

<sup>5</sup> However naturalists may doubt of the reality of mermen, or mermaids, if we may believe particular writers, there seems testimony enough to establish it. In the year 1187, as Larrey relates, such a monster was fished up in the county of Suffolk, and kept by the governor for six months. It bore so near a conformity with man, that nothing seemed wanting to it besides speech. One day it took the opportunity of making its escape, and plunged into the sea, and was never more heard of. Hist. d'Angleterre, p. i. p. 403.

In the year 1430, we are told, that after a huge tempest which broke down the dykes in Holland, and made way for the sea into the meadows, &c., some girls, of the town of Edam, in West Friesland, going in a boat to milk their cows, perceived a mermaid embarrassed in the mud with a very little water. They took it into their boat, and brought it with them to Edam, dressed it in women's apparel, and taught it to spin. It fed like one of them, but could never be brought to offer at speech. Some time after it was brought to Haerlem, where it lived for some years, though still showing an inclination to the water. Parival relates that they had given it some notions of a deity, and that it made reverences very devoutly whenever it passed by a crucifix. (*Delices d'Hollande.*) In the year 1560, near the island of Manar, on the western coast of the island of Ceylon, some fishermen are said to have brought up at one draught of a net, seven mermen and maids; of which several Jesuits, and among the rest, F. Hen. Henriques, and Dimas Bosquez, physician to the viceroy of Goa, are said to have been witnesses. And it is added, that the physicians, who examined them with a great deal of care, and made dissections thereof asserted that all the parts, both internal and external, were found perfectly conformable to those of men. See the Hist. de la Compagne de Jesus, p. ii. tom. iv. No. 267, where the relation is given at length.

We have another account, as well attested, of a merman, near the great rock called Diamond, on the coast of Martinico. The persons who saw it gave in a precise description of it before a notary; they affirmed that they saw it wipe its hands over its face, and even heard it blow its nose.

Another creature of the same species, was caught in the Baltic, in the year 1531, and sent as a present to Sigismund, king of Poland, with whom it lived three days, and was seen by all the court.

*Mr. Price.* Gentlemen of the Jury: This action is brought by the plaintiff to recover a debt from the defendant, who never owed him anything; to recover a penalty where no offense has been committed. Doctor Mitchill has aptly classed the community, and described the composition of the Legislature, which being a representation of the whole community, could not, of course, contain any great number of men acquainted with this branch of commerce. Mr. Gideon Lee was known to have drafted this bill, and to be a respectable and intelligent individual, and it was taken pretty much upon his

And another very young one was taken near Rocca de Sintra, as related by Damian Goes.

The king of Portugal, and the grand master of the order of St. James, are said to have had a suit at law, to determine which party these monsters belonged to. See Pontoppidan's Nat. Hist. of Norway, vol. ii. p. 186, &c.

Mr. Thomas Gunston of Newington Butts, whip and harness maker, had a mermaid in 1803, which he exhibited to his great honour, at two pence a head, though he might have obtained three hundred guineas for it, of which the Rev. Timothy Brownloe bears testimony.

Lib. ix. c. iii. *de Bellius in Indico Mari repertis*.—Pliny relates upon the authority of Alexander's lieutenants, that the Gedrosi, an Indian tribe, made gate posts of the jaws of whales, and roofed their houses with their bones.

And c. iv. (*Quae in quoque oceano maxima*)—he mentions the sword fish and the whale as inhabitants of the Indian sea, and the spermaceti whale as frequenting the Gallic sea, and spouting higher than the mast of a ship.

And in this same chapter, that they were found on the coast of Spain. (*In Gaditano Oceano*.)

In c. vi. (*De Balaenis et Orcis*)—he is more particular, and states that they are seen in winter in the straits of the Mediterranean sea, and describes them as resorting during the summer to quiet and retired bays, and greatly delighting in such retreats. And he relates a very remarkably story of a whale being discovered in the port of Ostia, and of an engagement which took place between it and the emperor Claudius, who went out against it with his praetorian guards, the Roman people enjoying the spectacle as seen from the shore, with very full details of the stratagems used by the imperial party to prevent its escape, by spreading nets, and other contrivances; and how, being driven ashore, it remained fixed, resembling an inverted ship, till finally the soldiers killed it with javelins and lances, but not till it had sunk one of the gallees by spouting water upon it. Pliny affirms that he was one of the spectators, and saw this thing with his own eyes.

credit, and, of course, little opposition or difficulty to the passing of it. Mr. Sharpe's explanation of the motives and intentions of the Legislature in passing the law, and of the objects it was meant to embrace, were opposed by the plaintiff's counsel, although he was the person who could best have informed you upon that subject, having been the chairman of the committee to whom it was referred, and who reported on the bill.

This may serve to show you, gentlemen, the fears and wishes of the counsel, and how anxious they were to suppress the evidence that would have best enlightened your judgments.

Liver oil was the only subject of the frauds practiced or

Cap. vii. (*an Spirant Pisces an dormant*)—In this chapter he shows that whales have no gills, and breathe through lungs; he also minutely describes the orifices in their skulls through which they spout.

Cap. viii. (*De Delphinis*).—After mentioning that dolphins pair; that they bring forth their young at the end of ten months gestation, and suckle them like quadrupeds; he enters particularly into the manners of the dolphin tribe, and relates a number of curious and amusing particulars; as their love of music, vocal and instrumental, their fondness for human society, their understanding in human speech, at least in the Latin tongue.

When the boys jokingly called them flatnose, (Simo) they understood railery so well, that instead of taking offense, as churls would do, they would come playfully on shore and eat from the hand. He also relates that there grew up such a friendship between one of these affectionate animals and a school boy, that every fine day he carried the boy on his back to Puteoli, where he went to school, and waited to bring him back in the same manner; and this story he says he would have been ashamed to have told, but that he had the authority of the letters of Mæcenas, Flavius, and others of senatorial dignity.

He tells also of one, who after having many times carried a strippling on his back, took him out into the deep on a stormy day, when the waves rose so high that he was washed off and drowned, to the utter disconsolation of the fish, who for thirty years after shunned all human society, and never ceased to repine and lament for his lost friend.

Dr. Shaw mentions a manati, called by the inhabitants of the country, on account of its gentle nature, "*matum*," which, at the time of the arrival of the Spaniards, was kept by a prince of Hispaniola in a lake adjoining to his residence; it hated the Spaniards, but would offer itself to its Indian favourites, and carry over the lake ten at a time, singing and playing on its back.

complained of, and it was that alone in which Mr. Lee dealt, and in which he was conversant, and in which we can suppose him to have taken so much interest. He was a tanner and currier, and in drawing up the bill must have had principally, if not altogether, in view that article almost exclusively employed in his particular business. The statute on which this suit is founded imposes a tax upon commerce, of which freedom is the life, and which never should be subjected to any unnecessary or vexatious restraints. All laws tending to clog or fetter commerce should be construed with extreme strictness, as being against common rights and national policy; and as no proof of the appointment of this inspector was offered to you, you ought not to aid by intendment, a hard and oppressive action. I say no proof, because the only proof that the plaintiff in this suit was a public inspector, or that there was any public inspector appointed, is Mr. Russell's answer, that the oil which he sold, and upon the non-inspection of which this action is founded, was not inspected by the public inspector. But for all legal purposes, if the fact is not proved, it does not exist; and if there were no inspector, there could be no default, and no penalty for the not submitting to inspection.

At all events, there is too much doubt and ambiguity to justify a finding upon this evidence, and in construing the law itself: so that it will be much the safer course to find here for the defendant, and send the plaintiff back to the Legislature, to have its sense declared or explained.

We have, however, upon the grounds of reason and science, given you the most convincing and authoritative evidence of what the legislature must have intended, since all legislative acts must be construed according to sound reason. And to whom could you apply with more safety, on a subject connected with science, than Dr. Mitchill; a man abounding in all useful knowledge; one of those luminaries of the present age, who, to use his own language, has stood upon the shoulders of those that went before him; who gathers his information from the Scriptures no less than from all other ancient

and modern authority, and out of the abundance of this knowledge, and the fullness of his conviction, solemnly swears that a whale is not a fish.

Let me now read from Goldsmith's *Animated Nature*, Vol. 5, p. 26:

"As on land, there are some orders of animals that seem formed to command the rest, with greater powers and more various instincts; so, in the ocean, there are fishes which seem formed upon a nobler plan than others, and that, to their fishy form, join the appetites and conformation of quadrupeds. These are all of the cetaceous kind, and so much raised above their fellows of the deep, in their appetites and instincts, that almost all our modern naturalists have fairly excluded them from the finny tribes, and will have them called, not fishes, but great beasts of the ocean; with them, it would be as improper to say, men go to Greenland fishing for whale, as it would, to say that a sportsman goes to Blackwall a fowling for mackarel. Yet, notwithstanding philosophers, men will always have their own way of talking, and for my own part, I think them here in the right. A different formation of the lungs, stomach, and intestines; a different manner of breathing, or propagating, are not sufficient to counterbalance the great obvious analogy which these animals bear to the whole finny tribe. They are shaped as other fishes, they swim with fins, they are entirely naked, without hair, they live in the water, though they come up to breathe, they are only seen in the depths of the ocean, and never come upon shore but when forced thither. These seem sufficient to plead in favour of the general denomination, and acquit mankind of error in ranking them with their lower companions of the deep, but still they are as many degrees raised above other fishes, in their nature, as they are in general in their size. This tribe is composed of the whale and its varieties; of the cachalot, the dolphin, the grampus, and the porpoise. All these resemble quadrupeds in their internal structure, and in some of their appetites and affections. Like quadrupeds, they have lungs, a midriff, a stomach, intestines, liver, spleen, bladder, and parts of generation. Their heart, also, resembles that of quadrupeds, with its partitions closed up as in them, and driving red and warm blood in circulation through the body; in short, every internal part bears a most striking similitude; and to keep these parts warm the whole kind are also covered, between the skin and the muscles, with a thick coat of fat, or blubber, which, like the bacon fat of a hog, keeps out the cold, renders their muscles glib and pliant, and, probably, makes them light in swimming."

This passage, gentlemen, shows you how men of science and letters agree as to the structure and properties of the whale kind. Goldsmith, with all indulgence to the popular opinion, still confirms the accounts given of these extraordinary crea-



tures, as delivered to you by Doctor Mitchill. And the counsel well knew that all men of science were of one mind, or why did they not produce other learned men to oppose his opinions. Doctor Mitchill, gentlemen, is a man whose reputation is too justly merited, and too deeply rooted, to be shaken by any attack. He is the first man of his age, and country; many great authorities, ancient and modern, have been cited, but he, in himself, is greater than them all.

Added to this evidence of the man most eminent in science, what has been the testimony of the practical men who have been examined on one side and the other. All the plaintiff's witnesses are leather dealers or curriers, who seldom ever make use of the oil of any whale, and never, perhaps, of the spermaceti; whilst those on our side, are extensive dealers in whale oil, and, necessarily, know every fact connected with their own branch of trade.

Mr. Fish, who was master of a vessel, whom you all know, is opposed by a Mr. Reeves, who had made, as he says, three voyages as a whaler. In which can you best place your confidence? Mr. Hazard tells you there is no more affinity between whale and fish oil, than between Indian meal and wheat flour. Mr. Comstock, a wholesale dealer in the article in question, tells you, that no longer ago than yesterday a gentleman asked him for fish oil, and having no other than whale oil, he told him he had none. Mr. Chase, who was called by the plaintiff, also tells you that this distinction is acknowledged.

Did they, who obtained this law, mean to entrap the dealers by using an ambiguous term, and when it was passed giving it a construction that was never expected nor intended, and which is only pretended to be within the knowledge of curriers and tanners, but entirely disowned by the commercial world? And if they have not convinced you by the strength of their testimony, gentlemen, I trust they will gain nothing by illiberal allusions, and by fixing on respectable and honorable citizens, the contemptuous epithet of Yankees; for I can tell the gentlemen that these same Yankees are amongst the most enterprising, spirited, and useful of our citizens, and

stand too high to be injured in their estimation by such undeserved appellations.

Should you not be able to agree with naturalists in one branch of the evidence in this cause, and decide that a whale is, in common acceptation of the community, considered to be a fish, there remains still a very important question, on the just decision of which the defendant will, I think, be entitled to your verdict. Is whale oil bought and sold and consumed under the appellation of fish oil? Should the distinction between these oils, sworn to by the defendant's witness, be regarded by you as correct and generally acknowledged in the community, the weight of evidence affords no ground to believe that there would be any great utility in classing whale oil among the mischiefs intended to be corrected or prevented by the act for the inspection of fish oil.

*General Bogardus.* The discussions which had occupied so much time would have been better suited to the New York Forum than to a court of justice. Juries had nothing to do with questions of science, nor if they had, was much dependence to be put in the evidence of naturalists, whose opinions and systems are daily changing, as the authors of them mount upon the shoulders one of the other. And although we have examined Dr. Mitchill as a witness in the cause, yet, gentlemen, I did not call him as one upon whose testimony I meant to place the defense of my client, but rather, because it was proposed as a matter of amusement, and I consented, considering that it would be interesting to curiosity to hear what he would say upon a question of so much novelty in a court of justice.

But, gentlemen, at the same time, it will be well understood by you, as it is well known by the Judge who presides, that juries have nothing to do with questions of science, which can only serve to perplex them; much less are the theories of scientific men to be taken as the law of the land, seeing how little philosophers are agreed amongst themselves; for ancient or modern, you never could bring twelve of them, if empaneled as a jury, to be unanimous on any one speculative point.

But I cannot, gentlemen, imagine what has brought together such a crowd of persons as have assembled in this room during the whole of the trial; for though there may be some little novelty in the question about the nature of the whale, yet it is not so mighty a matter as that the good people might not stay in their own houses while it was debated. One would suppose somebody had sent about handbills to invite the public to hear speeches. And when I see the great display of books and learning, by one of the counsel in particular, it makes me fear that his learning will be greater than his pay.

The question, whether a whale is a fish, or what else it may be, has nothing to with the issue you are trying, nor with the law under which the plaintiff is seeking to recover a penalty, or to make the defendant his debtor; for the action is not for the purpose of remunerating him for any injury the defendant has done him, or to be paid for anything he has sold or lent to him, but to get money out of his pocket which he never worked for, or earned in any way.

This action is brought, gentlemen, under a statute; and that statute is to be expounded so as to give effect to the intentions of the Legislature. And surely it never entered into the heads of the Legislature to ask whether a whale was a fish; nor was such a thing mentioned, nor even alluded to in the application for the law, or the correspondence touching it, or during its progress.

The questions for you, gentlemen, are clearly these two: 1. Whether sperm oil was intended by the Legislature to be made liable to inspection. 2. If so, whether the defendant has so violated the law as to have incurred its penalties.

As to the first, before you decide in the affirmative, you must have strong grounds of certainty and conviction; whereas, if your minds are in doubt or suspense as to the application of the law, your safer course is, to find for the defendant, and leave the parties where they were before the action was brought, when neither of them was indebted to the other for anything.

And, as to the second question, not only must penal acts be

construed strictly, but in point of fact, all cases under them must be fully made out, and the plaintiff held to strict proof. Now, there has been no proof that the plaintiff was an inspector under this law at the time of the three casks of oil; nor is there any competent evidence that he is so even now, nor that any other person is, or was. That should have been first made out; for if there was no inspector, the law would never inflict a penalty for not submitting to inspection: the law does not compel impossible things. Then why should you, upon uncertain testimony, take money out of the pocket of a respectable commercial man, to put it into the hands of a greedy officeholder, who never worked for, or earned it by any honorable industry, nor has any meritorious claim to it whatever?

The position taken on the other side, that if a whale be a fish, whale oil is of course to be called fish oil, is not true. Words are used sometimes in a large and general sense, and none is used more figuratively than the term, fish, or fishery. Thus, it is common to say, fishing for an anchor, fishing for a dead body, where a person has been drowned, or for a cable that has been parted and gone to the bottom. In another sense, we say, fishing a mast which has been cracked or sprung. So, that the terms cited from the English or Irish statutes, or the antiquated books of the common law, will not serve the counsel's turn; nor will he get anything by showing how the whale was in old times divided by the head and tail between the King and Queen. This old common law is not always common sense; we go more by common sense than they did in those times; and you will use your privilege in giving your verdict to common sense rather than uncommon learning. You will easily see that this law was only intended to prevent some fraud that existed, and where none existed, it could have no application. It can have none in this case, for there were no frauds in the article of sperm oil, nor indeed in any whale oil. The evidence, or the weight of the evidence, goes to show that these frauds were only in the fish or liver oil, and as

they only called for inspection, to them only can the law be applied.

My position is, that the law should be administered with a liberal view, and not loosely applied to things never meant to be affected by it: as suppose, that there were an ordinance of our corporation, establishing an inspection of fish, so as to prevent the sale of tainted, stale, or unwholesome fish, would you apply this to crabs and oysters, and encourage a greedy inspector to vex and torment the poor negroes that furnish our market with oysters, crabs, or clams? And yet these are generally called fish. So, if there was a law to inspect fowl feathers, would you, because geese are a kind of fowl, apply that to the feathers of geese, or would you confine it to what is more evidently meant; you would certainly take the restricted sense in a penal action, which is always the safest construction, and leave it to the Legislature to extend it further, if such was the intent, or the case required it. Or would you, because an ostrich was a bird, and so a fowl, suppose the inspector had a right to inspect the feathers of the military, or the plumes of the ladies? Fancy a general doing the honors of a parade day, and conducting the ladies who came to be spectators; and the inspector stopping them on their way, till he had examined the feather in the general's hat, and the ornaments of the ladies' heads, and this for the sake of raising a revenue for a very useless officeholder.

I read from Blackstone's Commentaries, to the same effect as I have previously urged it to the Court, to show that it was the rational meaning, and not the mere words of a statute, that were to govern its construction.

Now apply these rules to the case in hand: Here is a covetous officer, not contented with the legitimate profits which the act allows him, but grasping at all the varieties of oils, and taxing a branch of the commerce of the country, to feed his own cupidity.

It is certainly much better, gentlemen of the jury, that your verdict should stay his hand till the Legislature, since the

matter is drawn in question, shall have an opportunity to declare its own meaning, and say to what extent he is permitted to invade the common rights. The Legislators will have an opportunity of reconsidering the subject, and receiving ample information; and it will be then time enough to find, that one man is the debtor of another who never lent him anything, or sold him anything, or received anything from him, that could be the consideration of a debt, or who was bound to him by no contract express or implied. The Legislature will, then, no doubt, take the evidence of men who understand this commerce, or from Doctor Mitchill, if they think it necessary to call for such scientific information as he is qualified to give them.

In the preamble of the law, and the tariff of the United States, nothing is said inconsistent with the distinction taken by the defendant, and proved by his witnesses, that sperm and whale oil were distinct from, and never to be confounded with fish oil.

As I have detained the jury long enough at so late an hour, I will make but a few brief observations on the testimony given in the course of the trial. You should contrast the different degrees of interest, respectability, consistency, and grounds of knowledge of the various witnesses. Tanners could not be considered as competent judges of an article which they very seldom used; but the merchants who traded largely in it, could not be ignorant of its nature and description, and what concerned it, and how it was considered in the commercial world.

I was surprised, indeed, as to the testimony of Mr. Lorillard, whom I took to be a sensible, discreet man; but I could not put much reliance on Mr. Lee, when the gentleman says, that he is not from the eastward, but from Massachusetts, and his evidence, or his knowledge, could not be fairly put in opposition to that of Mr. Fish, whose dealings had been exclusive, and whose knowledge was practical; Mr. Hazard was a witness of great credit and extensive dealing also, whereas Mr. Lee, it appears, though he talks much of his correspondence,

and produces it before you, has only dealt with one house, and is a dealer in leather merely, and does not employ whale or sperm oil in the course of his business.

*Mr. Anthon* said that they relied upon the price currents produced by Mr. Lee, so far as they went to prove that there was no such distinction known in the various ports from which they issued.

*General Bogardus.* As to the testimony of Mr. Reeves, who had been opposed to Mr. Fish, he was but a common whaler who had made but three voyages, whereas Mr. Fish had been so many years master of a vessel in the trade. It appeared, however, from the testimony of Reeves himself, that such a distinction was known as that contended for by him.

We infer from the provisions of the law appointing inspectors in New York, Albany, and Hudson, and none at Sag Harbor, where the whale oil was principally brought in, that the Legislature could not have intended the inspection to extend to whale or sperm oil. We strongly press the propriety of finding for the defendant, and leaving the plaintiff and his witnesses to apply for an explanatory law if they had any confidence in such an application.

*Mr. Anthon.* Gentlemen of the Jury: I shall trouble you with a few remarks on the law and evidence in this cause, the wit and learning belonging to it I shall leave to my learned associate.

Our opponents gave early intimation of their consciousness of the imbecility of their defense, by resorting at the very outset to legal technicalities, by which they hoped to avoid a contest on the merits; and although driven from these holds, and compelled to produce their strength before you, they still manifest their alarm, by calling for your verdict on the last desperate formal objection that remains to them.

We are told, that there is no evidence that any inspector was ever appointed under this law, and that, consequently, there could be no fault in the defendant in purchasing uninspected oil. Although this proposition has been thus gravely put before you, is it a legitimate question in this cause? Has



not this trial proceeded throughout on that as an admitted fact? But independent of this manifest admission, the defendant himself has furnished us with ample proof. The testimony of Mr. Davis, who describes Mr. Maurice in the act of inspecting oils, shortly after the passing of the law, and entrapped for the moment by the question artfully put to him, whether he was inspecting fish oil? The admissions of Mr. Fish and Mr. Hazard, that through fear of the penalties of the law, they have submitted to have their oils inspected from time to time, afford abundant proof of an inspector in the active exercise of his office; we are not bound to produce his commission, as the Court will charge you.

Driven, therefore, from this last forlorn hope, the defendant is compelled, reluctantly indeed, to meet us on the substantial merits of the cause.

In deciding this controversy, gentlemen, I must request you to bear in mind its strong discriminating feature. It is a struggle between the vendors on the one side, and the purchasers on the other, the latter insisting on inspection for their protection, and the former wishing to avoid it for their own interest; this fact will fully account for all collisions in the testimony in this cause, and if carefully attended to, will enable you to solve all its difficulties. We have conducted this cause, on our part, with perfect good humor, which has not certainly been manifested by our opponents; but as temper is at once the evidence and prerogative of acknowledged defeat, we are bound to bear with it, and even to answer its querelousness. We are told in this spirit, that the plaintiff is an avaricious and greedy inspector; we reply, that we can discover nothing in him but a faithful public servant, duly executing the trust reposed in him. We are told, that he is seeking in this suit, to obtain money he has never worked for; we reply, that this, if allowed to have any weight with a jury, would go to repeal all penal provisions in our statute book. Our opponents next attempt to alarm you, and gain your sympathies in their favor by alleging that we charge the de-

fendant with fraud; the suggestion is entirely their own, and we have throughout disclaimed it.

These matters, then, being disposed of, let us return to the cause.

It has been fully proved, that the defendant, in the month of September last, purchased from Mr. Russell three casks of sperm oil, which oil, at the time of the purchase, had not been inspected.

If the oil, therefore, contained in those casks was fish oil, the penalty of the law attaches to the defendant, and, consequently, in order to escape the penalty, he must either convince you that the oil of a whale is not the oil of a fish, or that whale oil is not fish oil in a commercial acceptation, both of which he has attempted, but has unquestionably failed in both.

As to the opinions and classifications of modern naturalists on the subject, they are undoubtedly against us as far as their evidence has been heard. And if this statute is to be interpreted in this way, we should be bound to surrender our common sense, and say with Doctor Mitchill, that a whale is not a fish, and that whale oil is, consequently, not fish oil. But, gentlemen, such a construction of a statute would be in opposition to the well established rules of the common law. Statutes being enacted to regulate the conduct of the whole community, the words of the statute are to be interpreted according to their common usage and acceptation. Applying this plain rule to this case, all refined theories are at once put to flight, and the words "fish oils" must be considered as embracing the oil of the whale, as well as that of any other fish.

On this branch of the subject, as my learned colleague will have much to say, and as I am desirous to give him full possession of the field, I shall content myself with giving one practical illustration of the absurdities into which the interpretation of statutes, according to the opinions and classifications of naturalists, would inevitably lead us.

The whale is elevated to the same class with man, because he breathes the vital air through lungs, and has, in common with

man, the various peculiarities which have been enumerated in the progress of this trial. The monkey possessing them also, in a still more eminent degree, is also classed with us; he is, in truth, in language of naturalists, no more a brute than a whale is a fish: he is, in short, in form and structure a man.

We have a statute which declares that every freeman shall be entitled to a vote at our public elections; let us suppose, then, that at some one of those arduous struggles, where every thing in the shape of man has been by the zeal of politicians urged to the hustings, that the learned doctor had appeared, leading forward with all due gravity to the polls an orang-outang, or man of the woods, would the stranger's vote be received, although the doctor should learnedly and eloquently urge his claims, as he has those of the whale on the present occasion? He breathes the vital air, the doctor might say, through lungs; he moves erect, etc., has warm blood; the female brings forth her young alive, and rears the bantling at her breasts. The inspectors would say, in reply to all the eloquence and learning of the doctor, as we do in the case of the whale, all this indeed is very strange and curious, but still, doctor, it is a monkey in common acceptation, however naturalists may choose to hail and class him as a brother.

As to the common acceptation of the term, fish oil, we have offered you the most satisfactory testimony. We have produced and examined before you Mr. Gideon Lee, a gentleman of great respectability and intelligence, the very man, too, who penned the law in controversy; he tells you he is a tanner and currier; that this class of artisans use every kind of oil in their business; that they prefer the cod liver oil, but use whale oil when that cannot be procured; that they had been imposed upon and cheated in every species of oil they had used, and that this law was passed for their protection; he also tells you, that he was anxious to use a term sufficiently broad to cover all marine oils, and with that very view, introduced the term, "fish oil," into the statute; and this general sense, he says, is the common acceptation of the term. The counsel who first addressed you in behalf of the defend-

ant, has attempted to expose Mr. Lee and his testimony to ridicule. I am thoroughly acquainted with all the devices of that gentleman. He was eminent at the bar when I first entered its precincts, and as good fortune followed in his steps, and he had obtained respectability and wealth by his professional efforts, his movements naturally fixed my attention, and the secret springs which opened to him the avenues to success have been, to my judgment, frequently developed. On this occasion he has attempted one of them, but I trust the sterling merit of Mr. Lee will baffle his efforts. With peculiar adroitness, he singles out the most powerful witness of his antagonist, and employs all his power of raillery, sarcasm, and ridicule, against him, that he may weaken his influence over the minds of the jury. It is enough in this case, gentlemen, for the interest of my client, and it is a full performance of my duty to the witness, who is entitled to the protection of the counsel who produces him, to have exposed to view the masked battery of our opponents.

This witness is confirmed in all his statements by Mr. Jacob Lorillard, a gentleman of equal respectability and intelligence, who expressly states, that he considers every species of marine oil embraced under the term, fish oil, and that this is the common acceptance of the term.

Israel Corse, Thomas Brooks, William Hall, and Losee Van Nostrand, all respectable tanners and curriers, have been produced on our part, confirming the testimony of these gentlemen, and forming a body of testimony bearing on the very point in controversy, too powerful to be resisted.

The vendors of oil, who have been examined by our opponents, have drawn a distinction between fish oil and whale oil, and would have us to understand that fish oil embraces exclusively the cod liver oil, and such like oils extracted from the livers of fish, and that this is the common commercial acceptance of the words. It very speedily became manifest, that all these gentlemen were of eastern origin, and were giving to us the acceptance of the words in the eastern states only. When this became apparent, the question was reiterated

on our part to every witness, who maintained that opinion, whether he was not from the eastward, and the invariable affirmative demonstrated the force of our inquiry.

The counsel for the defendant here upbraids us with having called respectable gentlemen by the vulgar epithet of Yankees. That term was never heard in this cause until used by our opponents in their address to you; neither vulgarity of epithet, nor angry feeling, have been manifested by us in this cause. We are indebted to our opponents for both. We respect this class of our fellow-citizens as much as they can, but we are not, therefore, willing that they shall dictate to us the meaning of words, especially when the whole commercial world is arrayed against them.

In opposition to this novel distinction, we have produced to you the price currents of London, Liverpool, Bordeaux, and Baltimore, and it is not to be found in any of them; on the contrary, you have seen in some of them the term, "fish oil," applied in the very same sense in which it is used in this statute. We have, therefore, the common acceptation of the terms, and also the acceptation of the whole commercial world, in opposition to a mere provincial usage, and it certainly can require no refined deductions of reason to teach you which ought to prevail.

There is another rule of construction which we have also applied to the interpretation of this statute, an inquiry into the mischief intended to be prevented; and have fully proved that frauds have been practiced in every species of whale oil, and those too of the grossest nature. We have proved to you that in a vessel of one hundred and ten gallons, ninety-six gallons of water have been detected, and that in a variety of others the water has varied from three to five gallons. When a matter is thus proved to be fully within the mischief intended to be prevented by a statute, it is the strongest possible evidence that it was the intention of the Legislature to embrace it within its provisions.

The title of the statute, in which the term "fish oils" is used, is conclusive evidence that more was intended by the

act than mere fish oil, in the limited sense contended for by the defendant.

Gentlemen, this case is now with you; it is for you to dispose of it according to the testimony before you. The counsel for the defendant desire you to decline the decision, and thus to send back the statute to the Legislature for their interpretation. You cannot safely follow their advice; you have an oath on record, which you would thereby violate. You are sworn to decide between these parties, according to the evidence—and the evidence is decidedly with the plaintiff.

*Mr. Sampson.* Gentlemen of the Jury: Curious and novel as is the subject of this trial, and much as it challenges of observation, I fear, at this late hour, I can offer nothing so agreeable to you as retirement and repose. I shall, therefore, leave much unsaid of what, under less disadvantageous circumstances, might not have been thought from the purpose. The evidence has been so perspicuously commented upon by my learned colleague, that I shall be readily excused from going over the same ground, as nothing is more tedious to a jury, nor less profitable to a client, than repetitions by one counsel of what another has said.

The result seems to be this—that, though the witnesses on the one side and the other, hold opposite opinions, yet the character of none has been impeached; all that can affect the credit of any, is that bias which the law recognizes as a principle of human nature whenever interest usurps over the judgment. And when our adversaries show, that their witnesses are wholesale vendors of whale oils, and ours only casual purchasers, they show in which scale the weight of interest preponderates; and prove everything for us.

As to the evidence touching the meaning of the Legislature, I had great doubts whether it was admissible; but as the counsel for the defendant introduced it, we have rebutted it, I think, successfully. We have produced Mr. Lee, a competent and most intelligent witness; he drew the bill and tells you with what view the act was solicited from the Legislature, what mischiefs it was intended to remedy; and that the term,

“fish oils,” was used as the most certain to embrace all marine oils, and that of whales, amongst the rest, without any possibility of doubt or equivocation.

And to show the general understanding of the commercial world, price currents, bills of lading, bills of parcels, and correspondences, both foreign and domestic, have been produced, to which nothing has been opposed, unless the particular phraseology of a small section of the union shall control the general acceptation of words.

My learned colleague has been accused of illiberality, because he directed his inquiries to this point, and has been charged with calling the witnesses of the defendant Yankees. Certainly, if the word Yankee be a reproach, he is not answerable, for he never once uttered it. Mr. Anthon has too much good sense, if good manners did not restrain him, not to know that a counsel never gains a point by the use of national or local reflection, but at the expense of his own character. The opposite counsel paid the worst compliment to their own witness, first, by introducing the word Yankee, if it be a term of reproach in their apprehension; and, secondly, by supposing it to be such; for my part, I have often heard it echoed as a word of triumph—and who has not joined in the chorus of Yankee Doodle. Sure I am of one thing, that though the witnesses on the other side may be interested in the event of this trial, they will still have the good sense to acknowledge that my friend has done nothing but his duty, and on other occasions they will endeavor, when they want an able advocate, to engage him on their side. Nor will it more avail the counsel to exhibit these gentlemen from the eastward in the light of martyrs; for if they have any good quality, and I think they have many, they possess, in a peculiar degree, that good sense that takes care of itself, and are better made to figure in any other character than that of victims. And, truly, the oppression they suffer by this law, is not much. Before it passed, they paid twelve cents a cask for gauging; and now they pay ten cents for both gauging and inspection—buyer and seller each paying ten cents.



Having said so much for my associate counsel, respect for those opposed to us requires that I should give some answer to their arguments. Luckily for me, they have neutralized each other. As sometimes it happens in an unconcerted night attack, they have fired into each others mouths. The one clung with affectionate zeal to the great Ichthyologist, as determined to stand or fall with him who was the pride of science, the honor of his country, the glory of the age, light of the universe, and so on, and so on, still kindling as he spake, till it went nigh to weeping with me, so like it sounded to a funeral oration. For, though I would not deprive that great man of his rank amongst constellations, yet, let it not offend him, if I wish his apotheosis deferred for a time; for were he suddenly snatched from among us, there is none in this sublunary sphere to fill his place. Not only in the regions of science would there be a void and vacancy, but man, woman, and child, would miss him in his walks; and fish, flesh, and fowl, mourn for their historian.

Happily for all, it was but a false alarm. He is yet in the body, yet hale and vivacious; so that if his eloquent panegyrist does not keep from such strong emotions, from the night air, and other accidents that shorten life, the doctor may live to repay the compliment, and sing his dirge in return. But I hope that day is also far distant.

The other counsel, who affected so little respect for science, did not turn his back, however, upon science, whilst science kept her face toward him; but no sooner did he find that all the philosophy was in the Pentateuch, than he tacked about, for as he could not persuade himself, so he knew he could not persuade the jury, that Moses classed whales with men and four-footed beasts. If he had not studied comparative anatomy, he had learned to dissect men's thoughts, and he saw with the glance of a practiced eye, that the joke would not take. So shifting his course with the sudden shift of the wind, he cries, what's this? What is all this? What have we to do with all this learning? What have juries to do with questions of science? What need have we of Doctor Mitchill? But recol-

lecting that he had subpoenaed Doctor Mitchill, and postponed the trial because of the absence of Doctor Mitchill, he slants off by saying, "I only consented to his coming, because it was proposed for the sake of amusement, as people like to hear him talk." Very good! and very true! and people have heard him talk. We all love the doctor, and everybody likes to hear him talk. And it needed no handbills to collect the crowd that has filled this court during the whole trial. The rumor of such a paradox, to be maintained by such a disputant, was enough, if the living had no curiosity, to bring the dead out of their graves. And let me say, that this crowd is a better prognostic of an enlightened community, and indicative of a higher moral sense and sentiment, than those that sometimes waste days and nights at trials where the only interest is in the lewdness of the story. And the counsel should have remembered, that making sport with men of might, is playing with edged tools. He should have recollected, that when the Philistines brought Samson up to make them sport, the sport he made them was to pull the house about their ears.

It was not "what have we to do with science," when the flag was first unfurled, and the trumpets flourished so loud, as who should say, here comes the great leviathan whom the arrow cannot make flee, the spear, the dart, nor the halbergeon; out of whose nostrils goeth smoke, as out of a seething pot or a cauldron; like the king of the children of pride that beholdest all things; and when my presumption was arraigned for inquiring into the grounds of his opinions, as though they were omnipotent.

Canst thou open the doors of his face, it was said, or words to that affect—Canst thou play with him as with a bird, or bind him for the maidens? Who shall put a hook in his nose, or go to him with a double bridle.

It reminded me of one of whom I never thought to speak again, and of whom you, gentlemen of the jury, never, I presume, did hear before.

Mickey McDonnell was a man, if compared to Doctor Mitchill, of very little learning. But in a country where

philosophy is taught by the bailiff and tythe proctor, and consists in the simple practical observances of hungry stomach, and bare feet, as in the realms of the blind, one eye makes a king; so there, a lofty stature, and corresponding energies of body and mind, and a knowledge of the Gaelic tongue, had acquired for the individual, blessed with such gifts, an ascendancy so high, that in his parish, and the two adjoining, his word was as an estoppel of record to all mankind. Chancellor or judge might err, but a decree once promulgated in this simple formula, "*se beal Mhihill fein duirt e,*" Mickey's own mouth said it—in a moment all was hushed.

If we must have a Mickey's mouth here, too, none so worthy as that which has spoken; yet still it is an opinion, that fire will not melt out of me, that a whale resembles a fish more than a man.

I labor under another difficulty; perhaps, it is a prejudice of education; but I was bred up in the faith, that a counsellor of the laws was not *ex concessio* to be so ignorant of all liberal learning, as to be spoon-fed by doctors of medicine, with ill concocted Greek, such as Greek babies would spit out; but, on the other hand, that not only his own dignity, but the dignity and efficacy of the laws, depended upon his competency to push every necessary inquiry, whenever opinion, in matter of science, became evidence; and, I trust, the counsel who interrupted me, will, upon reflection, bear me good will for vindicating the common privilege of the counsel, the client, and the community.

The other gentleman, in slighting philosophy, wrongs himself; for he made more ingenious distinctions out of his native abundance, and extempore, and in a few minutes, than would have cost Linnæus years of painful toil. The arrangement of ladies, ostriches, fowls, geese, and generals, or, as we may say, the feathered tribe, by their plumage, was very felicitous, and if his arguments were not of much weight in the cause, they were still feathers (which is something) in a soldier's cap. His association of fish, crabs, and oysters, though not according to the modern French school, also ingeniously curi-

ous, and proves, that he never wants resources, and will not, in any case, go out like a snuff.

His observations upon the allotment by the learned Prynne, of the whale's tail to the Queen's majesty, to furnish her royal wardrobe with whale bone, I feel in their full force; and am much troubled for an answer. That whales do not now wear whalebone in their tails, is as true, as that ladies have left off hooped petticoats, and gentlemen taken to wearing stays.<sup>6</sup> But whether the whales do this out of malice, or whether modern zoologists have made the alteration, is the thing to be inquired into; unless there be a third way of accounting for it, to which I am not the less inclined, from what I have heard in this cause; that very learned men may be very much mistaken. At all events, Prynne's *aurum reginum*, or queen's gold, go as far to prove a whale to be a fish, as the Princess Sophia, and the heirs of her body, do to make it flesh, and I leave the one as a set-off against the other.

Upon the authorities with which we had entrenched ourselves against the threatened invasion, the General remarked, in his own peculiar way, that he feared our pains would exceed our pay. I must there, also, admit, that there is much truth. Learning is not the commodity that comes to the best market, and if there be virtue in it, it must be its own reward. We, however, knew the sway of a great name, and that he who has to encounter the authority of Doctor Mitchill, backed by his ready elocution, cannot make himself too sure. Therefore it was, that we formed alliances with the Syrians, Greeks, and Chaldeans. Had certain opinions of Aristotle, before they became articles of faith, been brought to the test of common sense, and that great man had been called as a witness in the Heliaia, or other Athenian courts, and had some Crito, Phocion, or Isocrates, used the privilege of cross-examination, the schools would not have been occupied till our own times, with the unprofitable doctrines of form, privation, and matter, cate-

<sup>6</sup> By stat. 9 and 10 W. 3 c. 23, any person importing whale bone, other than in fins, forfeits one-half.

By 4 and 5 Anne, c. 12, s. 6, any dealing in whale bone, other than in fins regularly imported, to forfeit 30 pounds.

gories, sophisms, and syllogisms. Nor would it have been held impious amongst Christians, to impugn his heathenish dogmas. The same might be said of many other vanities, as the elixir of life, and the philosopher's stone, and all the subtleties of the Gnostics, Sciolists, Satyrists and Soothsayers. And remember, that if Aristotle was aggrandized by a pupil who made the world tributary to his researches, Mitchill, great in himself, holds a sway over public opinion no less despotic. Who but one conscious of his terrible power would have planted himself in the attitude of proud defiance, like a castle on a cliff, and proclaimed in the face of a court and jury what he did, on that ever memorable moment, when he declared, upon the faith of modern zoologists, that a whale was no more a fish than a man! and that none but lawyers and politicians would nowadays suppose it so. What would the learned doctor say, were I to enter his lecture room, and inform the youth of his class that his opinions were sophisticated, and refer them to the venerable sages of the law; to King Brutus, Queen Marcia, and the long and royal lines of British, Saxon, and Kentish lawgivers, Inas, Alfreds, and Edwards? What figure would the names of Blumenbach, Cuvier, or Lamark cut, opposed to Howel Dha, Dumwallo, Malmutius, and Blegradius Laugaridus, all of whom held the whale, as it was, and is, by the common law, a fish.

The learned witness could not steer clear of much uncertainty; when speaking of the sea cow, that goes ashore with its baby to graze, he called it one of the cetaceous tribe; though Linnæus ranks it in the order of the *bruta*, or brutish beasts. And so unsteady is the footing of those who stand upon each others shoulders, that I fear this cumulative series will not gain strength by numbers, and if the most learned are uppermost, there is danger of the column becoming top heavy. It was in this manner the giants tried to climb, but their pride got a fall, and I fear this new philosophical ladder will scarcely reach where Jacob's did. Upon the whole, it would be well when the books are next posted, and the balance struck, to add, by way of precaution, "errors excepted."

There is another difficulty. Every day brings to light some new and important creature: as the mammoth, known only by fossil remains; others long thought fabulous, revived and reinstated, as the camel-leopard, and the, syren, or mermaid;<sup>7</sup> the sea serpent, proved to exist by oaths, that strongest of human proof, by which men's lives are judged; the hyppocentaur, or Kentucky man, so celebrated on the banks of the Mississippi, worthy by its importance of a class or order for itself.<sup>8</sup>

Had the existence of these creatures been known, or admitted, they might have been connecting links to prevent such too important to be left out, the ranks must open to receive them as they respectively arrive, and the order of the parade be still changing. And what virtue is therein the scalpel of the anatomist, or in his blow-pipe, that he should have the sole privilege of new-creating, and nicknaming God's creatures. Why may not the school of Boerhaave found a system of zoology upon the *elementa medicinæ physico mathematicæ*, and class according to the animal functions, explained by mechanical causes and mathematical demonstrations.

The craniologist, craniosophist, cranionomist, or craniognost, after Gall and Spurzheim, may by the nervous streaks on the ganglion of the brain, and their circumvolutions on the hemispheres, and the protrusions by the organs of the mental faculties of the parallel lamina of the skull, as they indicate murder, robbery, love, courage, or constancy, class and arrange all living things. An amative class will take in hogs, frogs, and snails, and be called the Abelard and Elouisas. A pugnacious class will take in General Jackson, the game-cock, and the sword fish; unless the last of these be held by nearer ties to the class of the prudes and platonists, by the character of *castus amor*. Doves and dolphins will be of the Penelope class, and so of the rest.

<sup>7</sup> See note, ante, p. 629.

<sup>8</sup> When these formidable beings first appeared to the ancient French settlers, they named them sacrés Kaintucks, and they are still so called by many.

The geometricians will have pantometrical zoology, classing by points, lines, surfaces, and solids, the genders of curves, ratios of affections, motions, and positions. There will be the straight, crooked, and perpendicular families, the equilateral, curvilateral, and multicrural: The cycloid, trapezoid, and rhomboid orders, so that by comparing the angle of the bee's knee with the inclination of the cat's tail, there will be no danger of mistake. And with the aid of a Gunter's scale, a logarithmic table, and a theodolite, you may distinguish a maiden from a bat.

I do not say, there ever will be such systems, and if there were, I think they would be of little value, for those who attempt to follow nature into the secret recesses where she loves to retire, find themselves in a labyrinth to which they have no clue, waste themselves in unavailing toil, and sink subdued by efforts in which their powers are inadequate. Hence, those grave mistakes of the learned, who are neither lawyers nor politicians, nor sitting in halls of Legislature, but who judging of nature by their narrow views, would subject her to arbitrary regulations. Hence, those trembling lines, traced with a feeble hand; those limits which nature disavows, and boundaries which she disowns. Hence, those ephemeral systems which efface each other, succeeding like the ocean's waves, of which the inventor has only this benefit, that his errors are concealed under the protecting cloud of mystical jargon, and like to those who have the receipt of fern seed, he walks unseen. Nor is he who makes microscopic researches the best qualified to judge or testify; for the rays of the intellect, being concentrated upon one point, are apt to leave all else in darkness, and unnoticed.

The most learned, besides, are not always the most sure footed witnesses. Learning is a heavy burthen, and men will stagger under it. It is not so easy to run with the gates of Gaza on one's back.

The worst effect of all, however, is, that instead of inviting to the study of nature, and laying open the door of the most enchanting science, these systems rob it of its attractions, and



are as forbidding as the hundred tongued scare-crow of the Hesperian fruit. But I return to the learned witness.

There was a demigod of old, a great ichthyologist, for he kept the flocks of Neptune. He knew almost everything, and was consulted upon all great occasions, by kings and people. He was called Proteus, and could, if not disposed to answer categorically, use all shapes, shifts, and transitions. It was so with the learned witness in this cause; you saw that he eluded our inquiries; how he flew from the Arctic to the Antarctic circle; from Davis's straights to the straights of Magellan; and, like Puck, the fairy, put a girdle around the earth in forty minutes. But I, remembering the moral, held fast till he solved every doubt, by referring to the authority of Moses; and as this part of our subject will not admit of levity, I now beg your serious attention.

In the first chapter of Genesis is related, with simple brevity, the daily progress of the creation. We there find the style of narration by the inspired writer to be this: First, to announce the will of the creator touching each distinct act; and then, in terms as distinct, the execution of it. Thus: let there be light—and there was light; let there be a firmament—and God created the firmament; let the waters be gathered together, and the dry land appear—and then follows the formation of the earth; let the earth bring forth grass, etc.—and the earth brought forth, etc.; let there be lights in the firmament—and then God made two great lights. In like manner, the history proceeds, till the twentieth and twenty-first verses, which relates the fifth day's work. Thus, we find in the Sacred history of the creation, one homogeneous ray of light, and in the corruptions of the heathen poets and mythologists the same ray, altered as it were by prismatic refraction, exhibiting a show of various colors, but wanting the purity of the original.

“And God said, let the waters bring forth abundantly, the moving creature that hath life, and fowl that may fly above the earth in the open firmament of heaven.”

This is evidently, as in all the preceding instances, the enumeration of the intent of the Almighty, to create the finny

and the feathered tribes, and the execution of that purpose is related in the succeeding verse, where the whale is put, not as a distinct creature, but as the great type of all fish.

“And God created great whales, and every living creature that moveth, which the waters brought forth abundantly after their kind, and the winged fowl after their kind.”

Now, the witness thinks, that he finds the creation of fish by implication in the former of these two verses, and that of whales distinct from fish in the latter, for otherwise, he thinks, the fish would have been twice created.

This savors a little of incogitancy, and wants the precision that usually marks the opinions of Doctor Mitchill. For as the creation of fish is at least as strongly implied in the latter, as the former verse, it would follow that whales were created once, and fish twice.

But Scriptural authority does not stop there. In the book of Jonah, ch. 1, v. 17, it is said, “the Lord prepared a great fish,” and that Jonah was in the belly of the fish three days and three nights; and the Gospel of St. Matthew, ch. 12, v. 40, says, that “as the prophet Jonah was three days and three nights in the whale’s belly,” etc., showing that the great fish was no other than a whale! So, the common law, which is founded upon the law of God and revelation, has always considered it; so nine-tenths of all that speak English consider it. What equivalent does this philosophy then offer for the surrender of faith, law, and vernacular speech? I am no canter, nor was it I that pressed Holy Writ into the argument of the cause; but I should beg of the doctor, if it can be at all dispensed with, to let us remain as we were before the second creation, for I do not think it becoming for the lords of the creation to be ranked with porpoises and hogs. Not that *mammalia* sounds so badly, nor is *primas* an ill name; but *bimanus* and *quadrumanus* are too much to be endured, however it may be that man, monkey, and bat, all agree in the number of incisor teeth, and pectoral *mammæ*. Figure to yourselves, gentlemen, a beautiful woman in the act of nursing her first child, her eyes beaming with tenderness and love, and grace and

beauty in her form and attitude; and now imagine me a Borneo bat, clinging torpidly in some filthy hole, by the hooks which terminate its hinder extremities, its head downwards, its ugly brood sticking to its dugs, and reconcile, if you can, this fantastical association to decency or reason. What is there in common between the beings made after God's image, excelling all in beauty, and that which, still conscious of its hideous aspect, and nothing elated by its new brevet, will not venture abroad till the blessed sun has withdrawn his light, and evening has cast her friendly veil over its unseemliness.

I may, perhaps, be speaking too irreverently, perhaps ignorantly, of what the learned commend; but still, I think, the onus lies on the advocates of this new philosophy to show to what good it tends. If it be to elevate the brutes, it is well contrived; but if it is for the benefit of the human kind, let them show what its virtue is. If it makes us better, happier, or wiser, diminishes our toils, lessens our sorrows, or exalts our hopes, it is worthy of our gratitude and praise.

But if it be said that these arrangements assist man in acquiring knowledge of subordinate creatures, I will ask how this can be, since we find the whale and dolphin in an order called cetaceous, by reason of their inhabiting the sea, having a double heart, lungs, and warm blood, and yet we find others of these same cetacea, as the seal and the sea cow, associated, the one with the predaceous beasts of the forest, and the other with those called brutes, as the elephant and armadillo, where no one would think of looking for them, and that by so insignificant a relation as their teeth. And as man is related to monkeys by the same members, I should like to be informed whether he might not lose his caste by the loss of his front teeth, and in such case, whether the dentist could restore him; the maxim of law being that a prescriptive right once suspended is gone forever.

Yes, gentlemen of the jury, in the same order with man, they place the monkey, ape, and baboon; all equally related, and differing from the lord of creation only as they differ from each other. To do them justice, however, they have dis-

covered a way by which a man may be distinguished from his class-fellows, and that is by his thumbs. He has a great toe upon his hind foot, where they, it seems, to assist them in climbing, have a thumb. He then has but two hands, and they have four, or, to speak learnedly, he is bimanus, and they are quadrimanus. As it was long before the workings of genius brought this discovery to the world's light, it is wonderful how these brothers were known apart before the days of Linnæus. But now, the rule is this, and if you follow it, you will be quite safe. A man is an ape minus two thumbs, and a baboon minus two thumbs and a tail. And, *e converso*, a baboon is a man plus two thumbs and a tail, and a monkey is a man plus two thumbs; or thus, a man with an extra pair of thumbs would be an ape, and with those, and the addition of a tail, would be a baboon. If I had not known this to be philosophy, I should have supposed it was the black art. It is enough to give bad dreams. There is a story of a poor man who was so infected with this philosophy, that he became hypochondriac, and seeing a bat flying about, stuck his thumbs and great toes through the corners of his blanket and went out of the window to take a few turns through the air with his cousin *vespertilio*. You can conceive how it ended, he died a victim of the Linnæan system, leaving a wife and children to deplore his untimely loss. Again, what is more grotesque than associating the kraken, which is a mile and a half big, with the oyster, in the class of worms; or crabs and lobsters with fleas and lice; yet so much do these systems mislead, that Sir Joseph Banks boiled his fleas to see if they would turn red. What more violent than to class man with whales, upon the ground of some casual conformities, since, notwithstanding the bony skeleton, double heart, warm blood, and alternate breathing, there are scarcely two things, even physically speaking, so unlike; its form, attitude, covering, manner of moving, and being, declaring it to be of the finny tribe; yet you have heard one of the greatest men of the age, and one as good as he is great, declare, upon the solemnity of his oath, that a whale was no more a fish than a man. If he had said, even,

that it was half a fish, I should have been less unhappy, because, from the midriff down, it has no one of the characters of man or quadruped, so that all the power of philosophy, with "oxen and wain-ropes" to boot, can never get it more than half out of the water. And the other characters relied on are very uncertain, since we find from that practical witness, Mr. Reeves, that the dog-fish is also viviparous, the word being, that the whale calves, and the dog pups; and it is well known, that the bleeny and the eel bring forth their young alive.

It is worth remarking, that Pliny, the most learned of the heathens, agrees with Moses, in placing man at the head of the creation, where God placed him; classing the rest under the obvious divisions of terrestrial, aquatic, amphibious, birds, and insects; a classification that unsophisticated reason will assent to as long as the book of nature lies open, and man is not too proud to read in it. It was so the masterly genius of the great Buffon viewed these contrivances, rescued science from pedantry, brought light from darkness, and grouped families by family likeness. So, Goldsmith after him, the child of sense and taste, the exquisite interpreter of nature; for though he could appreciate the efforts of Linnæus, the vivid instinct of his own mind pointed out to him how much industry may be wasted in laborious trifling.

If wit consists in seeing resemblances, and judgment in perceiving differences, I think those men discover more wit than wisdom, who catch at such slight resemblances, and overlook such glaring dissimilitudes.

There are few things, indeed, animate or inanimate, in which fancy cannot find resemblance; a facile imagination finds forms in the clouds, and figures in the fire; but take away the quality of life, and there is less similarity between a man and a whale, than between a whale and a whistle. Your imagination will supply the rest; my allotted hour is out, and I therefore conclude, that, as the law stands, we have proved everything to entitle us to your verdict, and that none of the grounds of defense taken are maintainable. If there be any

reason why the law should be altered or amended, it concerns the Legislature, and the griefs of the parties must be carried there. It is for our opponents to set forth the motives for legislative interposition; and, I think, they must show some better reasons than they have been able to do upon this trial, or they will equally fail there.

The RECORDER (to the jury). In the first place, the defendant objects to the want of evidence, that the plaintiff was appointed, or that any person was appointed inspector of oils under the act, and that no penalty could attach for selling or buying without inspection, if there were no person to do the duty of inspector. But this point was sufficiently made out by the evidence of Mr. Duncan and Mr. Hazard. The production and proof of Mr. Maurice's commission is unnecessary, as it was not an instrument through which the plaintiff made any title or justification. The fact of selling being proved by the admissions of the defendant to Mr. Ellis, and not at all denied, the broad question remains, has the defendant incurred the penalty under the act.

In construing statutes, a court and jury must be guided by the spirit rather than the letter. The term "any oils," in this section, would, if taken at the letter, embrace every kind of oil, and even vegetable oil, but from the context and the letter, we must narrow it down to fish oil. The proof is, that the oil in question was called spermaceti, and that it is extracted from an animal called the spermaceti whale, and there comes the question, is that whale a fish? For the defendant it is contended: First. That the whale is not a fish. Second. If so, the oil of the whale cannot be fish oil. Third. That the Legislature did not intend that spermaceti or whale oil should be inspected, but used the word fish in a different sense.

To come at the true application of the law to the fact, the counsel has taken various courses. They have called our attention, First. To the theories of naturalists. Secondly. To the popular acceptance of the terms used. Thirdly. To the common and statute law.

Between the most eminent zoologists, ancient and modern, there is much disagreement, and even the moderns are not in accordance with each other: You have heard the opinions of Doctor Goldsmith, amongst others, who, after reciting the distinguishing characters of the whale, still yields to the popular belief, that a whale is a fish; but you have also heard the testimony, upon oath, of our learned fellow-citizen, who tells you, with great seriousness, that a whale is no more a fish than a man. It is, however, admitted that the great mass of mankind, and as Doctor Mitchill says, of those that speak English, do call it a fish.

As to the legal sense, there is not much doubt. Treatises on common law, and the ancient English statutes, treat of it as a fish, and our national Congress, in legislating on the subject, likewise adopts the popular meaning. There is much plausibility in the arguments applied to the subject in these various points of view; and you must decide amongst these conflicting opinions, either adopting the opinions of the naturalists, of the mass of mankind, or of the common law.

But the subject has been also presented to our consideration in another important view, that is, as to the commercial sense. As to this, it is contended, that fish oils were never used in commerce as applying to anything but the oils which proceed from the livers of fish, and on this point also, very respectable witnesses have been opposed in opinion to each other. Those for the defendant, have testified that if an order was given for fish oil, they would no more think of sending whale oil than they would on an order for sugar, send molasses; that when whale oil is called for, it is particularly demanded by some of the names which distinguish one kind from another, as sperm oil, etc. If these opinions are correct, it would lead us to think, that the Legislature did not intend to include whale oil under the term fish oils. But, on the other hand, many respectable witnesses swear, that in commerce, it means all manner of marine oil, including the oil of whales of every species; and they have supported their opinion by producing price currents of various countries; then you must judge to



which of these opinions you will yield your assent, it being entirely a matter of fact.

The mischief, to remedy which a statute is enacted, is one of the rules for its construction. Testimony has been given to throw light upon the subject also, in this pretty important point of view. But here we find the same diversity of opinion among the witnesses; some saying that there were no frauds in whale oil requiring inspection; whilst others swear to actual frauds committed and detected. There is much difficulty in coming to a conclusion. We must expound the law according to the intent of the Legislature, as near as we can find it; but sometimes the object to which the law is to apply, is expressed by terms, the meaning of which is not defined in any book of law, nor to be ascertained except by the testimony of witnesses conversant with the particular subject, whether it belong to science, art, or commerce; and so it was understood by the defendant's counsel, when they called the learned Dr. Mitchill.

If, then, you are of opinion with the naturalists, that a whale is not a fish, or if you think that, in the commercial sense, fish oil does not mean whale oil, you may then find for the defendant, as he will not have incurred the penalty given by this statute. You may also, if you doubt, this being a penal act, and against the common right of the citizen, which is to deal in all commodities not noxious, or restrained or prohibited by law, find against the plaintiff.

The *Jury* retired, and returned in about a quarter of an hour with a verdict for the *Plaintiff*, for the three penalties demanded.

The *Defendant*, being dissatisfied with this verdict, moved for a new trial, in the next January term. The motion was argued by *General Bogardus* for the *Defendant*, and by *Mr. Sampson* and *Mr. Anthon* for the *Plaintiff*. The RECORDER being informed that the Legislature, then in session, had been petitioned for an amendment of the law, delayed his opinion, intending to grant a new trial, if the sense of the Legislature should make it appear that the statute had been incorrectly

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construed. But the Legislature having passed a new act,<sup>9</sup> the Judge refused a new trial. By amending the law, the Legislature considered that it bore the sense contended for by *Plaintiff*, viz.: that whale oil was subject to inspection.

*February 17, 1819.*

After the passing of this act, *Plaintiff* deeming his office of too little value or importance, immediately resigned it.

<sup>9</sup> Be it enacted by the people of the State of New York, represented in senate and assembly, that from and after the passing of this act, liver oil, commonly called fish oil, shall be inspected agreeably to the provisions of the act passed March 31, 1818, and hereby amended; that all other oils shall be exempt from inspection, anything in the act hereby amended to the contrary notwithstanding.

Passed February 5, 1819.

## THE TRIAL OF EBENEZER CLOUGH FOR EMBRACERY, BOSTON, MASSACHUSETTS, 1833.

### THE NARRATIVE.

This trial throws a side light on the movement following the abduction of Morgan.<sup>1</sup> There had been an action of libel tried in the Boston Courts, in which the parties were Masons and Anti-Masons, and in the course of the trial Clough, who seems to have been active in the distributing of Anti-Masonic literature, handed to one of the jurymen a pamphlet of this character. He was indicted for embracery, which Blackstone defines as "an attempt to influence a jury corruptly to one side by promises, persuasion, entreaties, money, entertainments, and the like." It was the first trial in this country for that crime of which we have any record.

As nearly all the voters and citizens of the state were on one side or the other of the question, the difficulty of finding an impartial jury is apparent. But the challenging of a juror because he was a Mason was not sustained and the trial resulted in the acquittal of the accused.

### THE TRIAL.<sup>2</sup>

*In the Municipal Court of Boston, Massachusetts, October, 1833.*

HON. PETER O. THACHER,<sup>3</sup> Judge.

*October 12.*

This indictment, for embracery,<sup>4</sup> found by the Grand Jury

<sup>1</sup> *Ante*, p. 385.

<sup>2</sup> • "Trial for alleged Embracery and Challenge of a Juror Decided by Triers. Commonwealth of Massachusetts vs. Ebenezer Clough. Before the Municipal Court of Boston. Judge Thacher. October Term, 1833. Boston: Printed by Beals, Homer & C., No. 36 Congress street. 1833."

<sup>3</sup> See 2 Am. St. Tr. 858.

<sup>4</sup> The jurors of the Commonwealth of Massachusetts on their

at the September term of the court, and continued to the present term, upon the individual recognizance of defendant, was read by the Clerk to defendant, to which he pleaded not guilty.

*S. D. Parker*, Commonwealth Attorney, for the Prosecution.

oath present, that Ebenezer Clough of said Boston, gentleman, on the nineteenth day of July, in the year of our Lord eighteen hundred and thirty-three, at Boston aforesaid, knowing that a certain jury of said County of Suffolk was then and there duly returned, impanelled and sworn, to try a certain issue joined in the Municipal Court of the City of Boston, begun and holden at said Boston, within and for the County of Suffolk aforesaid, on the first Monday of July, in the year of our Lord eighteen hundred and thirty-three, and then held and being in session according to law, on said nineteenth day of said July, between the Commonwealth of Massachusetts by Indictment, on the complaint and prosecution of one Samuel D. Green for a supposed Libel on him on one part, and on the other part the said issue was joined by one Charles W. Moore and one Edwin Sevey, as defendants, named in said indictment; and said Ebenezer Clough also knowing that a trial had been begun and was in progress and was about to be terminated, and had upon the issue aforesaid, before the said Court, on said nineteenth day of July, wickedly and unlawfully intending and devising to hinder a just and lawful trial of said issue by the jurors aforesaid, returned, impanelled and sworn as aforesaid, to try said issue, at said Boston, on said nineteenth day of said July; unlawfully, wickedly and unjustly, on behalf of said Samuel D. Green, the said prosecutor in said cause, did corruptly move, desire, solicit and persuade one Nathaniel Frothingham, one of the jurors of said jury, returned, impanelled and sworn according to law for the trial of said issue, to take and receive from said Clough, and the said Clough did unlawfully, unjustly and corruptly give and deliver then and there to said Frothingham, one of the jury as aforesaid, before said jury had been charged and instructed by the Court, and before they retired to agree on a verdict, a certain printed paper, one part whereof purported to have printed thereon a letter of the Honorable Samuel Dexter to the Grand Master of the Grand Lodge of Free Masons of Massachusetts, and on another part thereof there was purported to be printed an address to the Masonic fraternity, extracted from the Boston Centinel, printed in the year eighteen hundred and sixteen—and said Clough with the unlawful intentions aforesaid, did then and there urge, solicit and persuade said Frothingham, one of the jurors aforesaid, to read said printed paper, and to let others of the jurors so as aforesaid returned, impanelled and sworn, to try the said issue, to read the same, by way of commendation on behalf of said Green, prosecutor of said indictment as aforesaid, in as far as he was concerned and interested in the trial of the issue aforesaid, and in disparagement

*B. F. Hallett*,<sup>5</sup> for the Defendant.

The *Clerk* proceeded to call the jury. The first juror called was Daniel Sargent.

*Mr. Hallett* challenged the juror, to the favor, on the ground of supposed bias growing out of the oaths and obligations which he had taken upon him, as a Mason (the nominal prosecutor in this case being a Mason, and the defendant not a Mason). He claimed the right, in behalf of his client, to have the inquiry gone into, whether the juror had taken obligations as a Mason, which might prevent his standing indifferent, before he was sworn in this cause.

JUDGE THACHER. The statute makes it the duty of the Court, on motion of either party, to inquire of the juror whether he was conscious of any bias or prejudice.

*Mr. Hallett* said he did not make that motion, and did not propose to question the juror under the statute, but having a right to choose either mode, he should elect to prove the facts, *aliunde* by introducing testimony, instead of putting the juror on his *voire dire*, which would preclude further examination.

JUDGE THACHER said he had an undoubted right to elect to proceed either according to the statute, or under the common law.

of the said Charles W. Moore and Edwin Sevey, defendants named in said indictment as aforesaid, in so far as they were concerned and interested in the trial of said issue; and to influence said Frothingham and incline him to be more favorable to said Green than to said Moore and Sevey; and said Clough did then and there deliver to said Frothingham for the purpose aforesaid, the said printed paper, and said Frothingham did then and there receive from said Clough the said printed paper, and did carry the same there afterwards with him into the jury room, when said jury retired into their room to deliberate and agree upon their verdict and finding as to the issue aforesaid, he the said Clough then and there well knowing that said Nathaniel Frothingham then and there was one of the jurors returned, impanelled and sworn to try the said issue, against the peace and dignity of the Commonwealth aforesaid.

<sup>5</sup> HALLETT, Benjamin Franklin. (1797-1862.) Born Barnstable, Mass. A noted politician. Delegate to many political conventions. Chairman of the National committee of his party. United States District Attorney, Massachusetts.

*Mr. Hallett* said he preferred the mode pointed out by the common law.

*Mr. Parker.* If the gentleman elects to proceed under the common law, triors must be appointed, which had never been the practice in this state, though I am not prepared to say it is not a correct course.

*Mr. Hallett.* I am not aware what the practice had been, but believe the common law is in force here that a principal challenge was to be tried by the Court, but a challenge to favor for bias, etc., by two triors.

JUDGE THACHER. The question is a novel one, but I incline to the opinion that the proper mode to try a challenge to favor, where the party claimed it, is by appointing triors. If the counsel has any authorities in point, I should like to hear them.

*Mr. Hallett.* I cite 7 Dane's Abridgment, Sec. 3, Art. 6, p. 332. 1 Archbold's Practice, 184. Co. Litt. 158 a 2, Caine's Rep. 138. 1 Cowen 441. 1 South Rep., 364, 712. The doctrine there laid down is, if the challenge to the polls, be to the favor, it is thus tried. "If two jurors have been already called and take the box without challenge, they shall try the challenge; if not, the Court appoint two indifferent persons to try it, and who are thence named triors. If the triors try one juror, and he is found indifferent, he and the two triors shall try the next." Mr. Dane in his Abridgment, Vol. 7, p. 332, has this remark: "Acquaintance, etc., is a challenge to the favor and must be left to the triors sworn well and truly to try the issue whether the juror stands indifferent between the parties to this issue." From this remark, and the fact that Mr. Dane nowhere says the common law relating to triors is set aside, by the Jury Statute of 1807, I argue that the common law is still in force on that point, in this commonwealth.

JUDGE THACHER held that the triors should be appointed, and that no juror having been impanelled, the first juror called being the party challenged, the Court must appoint triors from the by-standers. He accordingly named Mr. Challice, and Mr. J. Marshall, members of the bar.

*Mr. Marshall* said that he was summoned in this cause as a witness for the defendant. He was excused by JUDGE THACHER, and Bradford Sumner, a barrister at law, appointed.

*Mr. Challice* claimed to be excused on the ground that he had formed an opinion upon the question whether Masonic oaths disqualified a juror from sitting, and he also was excused by the COURT, as not standing himself indifferent. John Pickering, barrister and City Solicitor, was next appointed.

*Mr. Pickering* protested against the right of the Judge to take up a counsellor and make him act as a juror. He said he was also engaged in other and more important business.

The JUDGE said the service must be performed by some one, and he knew of no one more qualified to discharge it than the gentleman he had appointed.

*Mr. Sumner* said he was not fully advised as to his rights or his duties in this case, but was disposed to conform to both, if he knew them. He conceived the exemption of a counsellor and attorney which applied to their serving as jurors, also, by analogy extended to triors, who were in effect jurors, and lawyers could not be made jurors.

*Mr. Hallett.* Lawyers could be made Judges, and even jurors were Judges. Triors were especially so, for they acted in the capacity of Judges.

*Mr. Pickering* said he was not apprised whether the proceeding was correct, but it appeared to him to be entirely irregular to select the triors from the officers of court, and he should like to be heard on that point. He thought the question ought to be reserved for the decision of the Supreme Court, as to the right of exemption.

JUDGE THACHER. This is a question which in its present stage must be decided here, and for that purpose this Court is supreme. I conceive I have a right to the services of the gentlemen and they must take their seats as triors.

*Mr. Pickering.* I never before have been obliged to submit to a mandate of the Court, but if it is insisted on, I shall not



resist the requisition, though I conceive it to be arbitrary to enforce me to this service.

**JUDGE THACHER.** The best men must expect to perform the most service, and sometimes they must submit to a disagreeable service, as in the present case. I conceive I have a right to their services, to aid the Court by their judgment in this business, and shall insist upon it.

The following oath was administered to the triors by the Clerk: "You shall well and truly try whether Daniel Sargent stands indifferent between the parties to this issue."

*Mr. Pickering* requested the Court to note the exception taken to the right to require a counsellor to sit as a trior, which was done, and the gentlemen took their seats, as triors.

*Mr. Hallett.* I expect to prove a bias by showing that the juror was a Freemason, that the nominal prosecutor was also a Freemason, and the defendant not a Mason, and that the obligations assumed by the juror, as a Mason, and the relation he stood in, in this particular case, are calculated to create a bias or prejudice, even unconsciously to himself, and under which he could not act with entire impartiality.

#### THE EVIDENCE.

*Benjamin Russell.*

*Mr. Hallett.* Do you know Daniel Sargent to be a member of the Masonic fraternity? I do not. Did you ever meet him or sit with him in a lodge? I shall not be interrogated by any one but your Honor. If your Honor will put the questions I am bound to answer, I will answer them. I will not be questioned except by the Court.

**THE COURT.** Why, Major Russell, you are necessarily as a witness bound to answer all legal questions which the counsel may put to you. The Court will see that your rights as a witness are protected, but it cannot take the

right of examination from the party and his counsel.

*Mr. Russell.* Then I must submit, but I do not wish to be interrogated impertinently.

*Mr. Hallett.* You may rely upon it Sir, that I shall treat you with entire respect, but I must insist upon my right to have you answer such questions as the Court does not prevent my putting to you. I thought there was something impertinent in the question. Oh, no, Sir, you will find no cause to complain; I shall treat you with very great respect; I only want to get all the facts.

**THE COURT.** You will answer

the question. Did you ever meet with Mr. Sargent in a lodge?

*Mr. Parker.* The question is wholly irrelevant. It has nothing to do with the matter in issue, whether the juror stood in-different.

The COURT. I think the question a proper one, and the witness must answer it. I have got it down that the witness says he does not know Daniel Sargent to be a member of the Masonic society.

*Mr. Russell.* I wish to correct it. My answer should have been that I had no personal knowledge he was ever initiated as a Mason. Whether I have ever sat with him in a lodge I cannot recollect. I was never present when he was tried as a Mason. It is thirty years since I have been much in the working lodges. I have been in the Grand Lodge, and did not attend the working lodges much, after I became a member of the Grand Lodge.

*Mr. Hallett.* Mr. Witness, have you ever seen.—

*Mr. Russell.* I consider that impertinent. I have not been in the habit of being called Mr. Witness. It is not my name.

*Mr. Hallett.* Then if you prefer it, I will certainly call you Major Russell. Mr. Witness is a very common mode of address at the bar, and I never before heard of its being considered impertinent.

*Mr. Russell.* It sounded to me so.

*Mr. Hallett.* Then you are certainly under a wrong impression. The witness may rely upon my treating him with all proper respect, consistent with the rights of my client.

*Mr. Parker.* It is now ap-

parent that the witness is a Mason, and I object to his being examined. If being a Mason is an objection to a juror, it is to a witness.

*Mr. Hallett.* The cases are entirely different. A witness cannot be set aside for bias or prejudice, but a juror can.

The COURT. You need not answer that objection. The question as I have taken it down, is have you ever seen Mr. Sargent in a Masonic procession?

*Mr. Russell.* To the best of my recollection I have not. There have not been many Masonic processions of late years. There was one at the laying of the corner stone of the Temple. I do not recollect whether I saw him there. I should not have been surprised if I had seen him there, because I always esteemed him as one of those high and honorable men, who usually are Masons.

*Mr. Hallett.* Did you know Mr. Daniel Sargent in 1801? Yes. Was he then known as Daniel Sargent, Jr.? He was. Were you at that time Grand Marshal of the Grand Lodge. I believe I was.

*Mr. Hallett.* Here is a book, called "Harris's Masonic Discourses." Look at the list of members of the lodges, etc., printed in it, among which appears your name and that of Daniel Sargent, Jr., as Masons.

*Mr. Russell.* I remember subscribing for that book, and suppose the list it gave of Masons is correct, but whether Mr. Sargent subscribed to it or not, I cannot tell.

*Mr. Parker.* We object to the book being offered in evidence. It might have been printed for

the occasion, at the Advocate office.

*Mr. Hallett.* Oh, no! it is a very old book, as the gentleman may see, if he will look at the title page; it was printed as long ago as five thousand eight hundred and one!

The COURT said the book could not be given in evidence, to prove that the juror was a Mason.

*Mr. Hallett* called Mr. Sargent, the juror, to be sworn as a witness before the triors.—*Mr. Parker* objected.

The COURT. He cannot be sworn. You have elected to prove the bias by other testimony, and must pursue that course.

*Hallett.* I conceive that I have the same right to call the juror as a witness, as to call any other person, as a witness before the triors. It is so laid down expressly in the books, and is the uniform practice in New York, where this mode of trying the impartiality of a juror is very common. In all the Lockport trials the challenged jurors were invariably examined before the triors.

The COURT. You cannot require the juror to be sworn in order to disparage himself by his testimony, and to show that he is not qualified to sit as a juror.

*Mr. Hallett.* A juror may be sworn as a witness before triors of his bias, unless the matter tends to his dishonor or discredit. In 1 Cow. 435, the juror was sworn before the triors on the issue of the challenge and the Supreme Court held that there was no impropriety in swearing the challenged juror as a witness, though the challenge was a prin-

cipal challenge, which ought to have been tried by the Court.

The COURT decided that the juror could not be examined as a witness, on the ground that it would tend to his disparagement of himself, and he could not be required to testify to what will discredit him.

*Mr. Hallett* asked the Court to note the exception he should take to the decision of his Honor, excluding the juror as a witness, in case the result of the trial should make it necessary to his client. Having this testimony unexpectedly excluded, he was not prepared with further testimony to make out the fact that the juror was a Mason, which was the first step in order to show that he was under a bias, growing out of his Masonic oaths. Having failed therefore, to make out the fact that the juror was a Mason, which comprised the whole ground of objection, he withdrew the objection, and the juror might be sworn.

The COURT. I cannot take the issue from the triors. The case is before them, and they must consider of it and return their verdict.

*Mr. Sumner* (one of the triors) conceived that the presumption in every case was, that the juror stood indifferent, unless objected to, but when the objection was taken out of the way, the presumption of impartiality prevails. The objection was withdrawn, in this case, by the party who made it.

*Mr. Pickering* (the other trior) did not see the necessity of a verdict after the objection was withdrawn. The juror stood as if no challenge had been made.

The COURT. Gentlemen, the

case is before you, and you must decide it. It is not in my power to take it from you. You must hear both sides, and make up your decision whether the juror stands indifferent.

*Mr. Hallett.* I had supposed that by withdrawing the objection, I left the matter where it was before the challenge was made, and I did so because the evidence did not seem to establish the fact, that the juror was a Mason, and I did not wish to

detain the triors by arguing upon this evidence—but if they were required to give a verdict, I felt it due to myself and my client, to show to the triors that if the fact were made out that the juror was under Masonic obligations, the grounds of the challenge were well taken, in the exercise of a plain legal right, and therefore ought not to work any prejudice to the defendant.

The COURT. The counsel is at liberty to proceed.

*Mr. Hallett.* Gentlemen Triors: Having by the decision of the Court, been unexpectedly deprived of the testimony on which I relied to prove the fact that the challenged juror is a Freemason, I had intended to relieve you from any further consideration of the subject and therefore withdrew the challenge; the whole and only ground of objection being that the juror, as a Freemason, has done certain acts and assumed certain obligations, which furnish legal grounds for the belief that he does not stand indifferent in this cause. If he has not taken these obligations, as a Freemason, I know of no objection to his indifference and certainly have none to his entire respectability as a citizen. But although I might have argued from the somewhat confused and contradictory statement of the witness, that the juror was a Mason, yet as the evidence was not sufficient to satisfy my mind as to that fact, I presumed it could not satisfy yours. I therefore felt bound to withdraw the challenge. The Court, however, is of opinion that the question cannot be taken from you, and that the triors must return a verdict; and as I know not in what form that verdict may be returned, I deem it a duty I owe to myself and my client, to state the grounds upon which the challenge was taken, in order to obviate the effects of any prejudice it might otherwise excite in this cause. Besides, as you are required to pass upon the testimony before you, I may at least infer the possibility that the conclusions you will come to, as to the fact whether the juror is a Mason, may be different from what

the evidence seems to me to warrant. If under these circumstances I can claim your attention, I shall esteem myself and my client fortunate in an opportunity of presenting the grounds of this challenge, to gentlemen distinguished for their professional learning and sound judgment. I make this no party or political question, but simply a legal question.

The grounds of this challenge are strictly legal, and though the question is novel here, the principles that govern it are the same as those that govern every other challenge to the favor. I do not challenge the juror because he is a Mason. That principle I totally disclaim, because it would go directly to his general competency as a juror in any case and would be a principal challenge, and not a challenge to favor. He may be a Mason and yet be a lawful juror in many cases. But I challenge him to the favor, in this cause, on the ground of bias, because he has, out of court, assumed certain obligations toward the members of a particular society, whose direct tendency is to compel or to incline him to give any member of that society a preference over a party who is not a member. The object of the challenge is to secure an impartial jury; a right of which the law is extremely jealous; and therefore challenges to the favor are always to be regarded with indulgence. Especially in this case, gentlemen triors, should the defendant be secure of having a jury free from all bias or prejudice, against him. He stands charged with an attempt to influence a juror, by an improper bias, and surely he should be tried by a jury, who are themselves free from all external influence or improper bias. If he is to be punished for attempting to render a jury partial, it should not be by a partial jury, some of whom are under obligations to favor the nominal prosecutor more than the defendant in this cause. The whole object and pretence of this trial is to guard the purity of juries, and it would be a libel upon public justice that a party thus arraigned should not be entitled to avail himself of every legal objection that will secure to him a fair trial, by a jury as impartial as the lot of humanity will admit.

You are then to consider the relation of the parties, assum-

ing as proved, that the juror is a Freemason. The legal prosecutor, who is virtually the party represented by the commonwealth, is a Mason, the defendant is not a Mason. The offense charged is an attempt to influence a juror in a case which has produced much excitement between Masons and Anti-Masons. Under these circumstances can a Mason on the jury be above all suspicion of bias? I do not place this question precisely on the ground of a case involving private interests, between a Mason and one not a Mason; it is not so strong a case as that would be, I admit; but I take it on the broad ground of the constitutional right to an impartial jury, which every citizen can claim.

There are two kinds of challenge, as is familiar to you gentlemen; a principal challenge for causes which in themselves disqualify a juror, and a challenge to the favor, which depends upon evidence to establish a bias or leaning, or undue influence in the mind of a juror. Such a bias or influence, we conceive, exists between a juror and a party who are Masons, the other party not being a Mason. The principles laid down in the authorities, which apply to this Masonic relation between a juror and one of the parties to a cause are these:

3rd Black. Com. 363. It is a good cause of challenge to a juror that he is the party's master, servant, steward, attorney, counsellor, or of the same society or corporation with him. The same rule is laid down in 1 Archbold's Practice 183, and also in 7 Dane's Abridgment 332. Mr. Dane says, "or of the same society," omitting the word corporation, but the principle is the same. See also Coke on Littleton, lib. 2, 157 b, sec. 234, where the causes of challenge to the favor are very fully given, and show upon what slight grounds of suspicion of bias the law will set a juror aside.

The case of *Mima Queen v. Kelburn*, 7 Cranch 291, 297, involves principles directly in point. Chief Justice Marshall takes ground there to secure impartiality in a jury, which cannot be sustained, unless the analogy is to embrace the case where the juror and one of the parties are brother Masons. The doctrine there which aptly applies to the challenge of a Mason, is this. "If a juror declare on oath to the triors that the testimony being equal, he should find a verdict for the plaintiff, he should be rejected." Now Masons hold that all things being equal, they are bound to prefer a brother Mason.

2 Reeves' History of the C. Law, p. 446, says, "a great or par-

ticular familiarity between the juror and a party, as being constantly at the same table with him, is a disqualification." Is not the intercourse between Masonic brethren closer than this? In Burr's trial (by Robinson), Vol. 1, p. 415, Chief Justice Marshall states the objection to a juror, arising from remote relationship, and adds "it is because the law suspects his prejudice; because in general persons in a similar situation would feel prejudice." So affinity to any member of a corporation, which is a party, is cause for challenge. 1 Saunders, 344.

Now would it not be absurd that the law should be so solicitous to secure an impartial jury, as to exclude from the jury a distant, unknown relative of the party, to the ninth degree even by marriage, and yet be wholly regardless of the strong artificial ties of brotherhood created by Masonic relations, where the juror is under sworn obligations to the party, much more unfavorable to an impartial decision than remote ties of relationship can be? Can it for a moment be believed, that a ninth cousin would be more likely to favor the party thus related to him than a Mason would be to favor a brother Mason, whom he has sworn to obey and assist and to extricate from difficulty right or wrong?

In 2 Salkeld 81, there is a case of a juror set aside from the trial because it was proved that the juror had lately entertained the prosecutor at his house. This circumstance, and in the case of a public prosecution too, was deemed sufficient to excite suspicion of the juror's impartiality toward the defendant, and he was set aside.

In 2 Caines Reports 133, Judge Livingston strongly implies that it would be a good challenge to the favor that the juror was an underwriter, in a case where one of the parties to the suit were also underwriters. Judge Woodworth cites and approves this principle, in 19 Johns. 121, 122, and he also held in that case that it would be proper evidence to support a challenge to the favor, that a juror was an indorser of a note or a stockholder at the bank of one of the parties.

Anthon's Nisi Prius 75, *Lewis v. Few*. In an action for a libel, the plaintiff challenged a juror as incompetent on the ground of his having been present and acting at the meeting at which the libel complained of was made public. In that case Justice Thompson (now a Judge of the U. S. Supreme Court) charged the triors "that the challenge was well taken, and that the juror could not be considered indifferent between the parties."

In 1 Cowen 432 (*Pringle v. Huse*) there is much valuable instruction on this point, and the mode of insuring an impartial jury. In that case the plaintiff in the court below had refused to go on



with the trial, because the Judge denied him an impartial jury. Chief Justice Savage refused a motion for judgment, as in case of nonsuit, because "the plaintiff was entitled to a jury free from partiality and bias." The ground of challenge in that case, was that the juror had expressed an opinion. The juror himself was called as a witness before the triors, which the Court say was properly done, and on his evidence the challenge was overruled; and yet Chief Justice Savage remarks "there is no reason to suppose the challenge was made for the purpose of delay, but in good faith, and under an honest impression that a fair trial could not be had by that jury."

The essence of the whole law on this subject is well expressed by Judge Woodward in the case of *Vermyle v. People*, 7 Cowen 122, viz.: that the requisition of the law is "that the mind (of the juror) is in a state of neutrality as respects the person and the matter to be tried; that there exists no bias for or against either party in the mind of the juror, calculated to operate on him."

So "if the triors are in doubt whether the juror is indifferent, they should find him not indifferent." 1 Cowen, 439. C. H. Recorder 81.

In this commonwealth the Legislature and the courts have been extremely cautious to insure an impartial jury to the party. The challenge in this case (if the juror is a Mason and has taken Masonic oaths) is founded on broad constitutional principles. The Constitution of the United States declares that "the accused shall enjoy the right of trial by an impartial jury." The 11th section of the Constitution of Massachusetts declares that "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs, in his person, property or character;" "It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice."

By the Statute of Massachusetts of 1807, Chap. 139, Sec. 9, it is enacted, that "the Justices of the respective courts shall, on motion from either party in a suit, put any juror upon oath, whether he is any way related to either party, or hath formed or given any opinion, or is sensible of any particular interest or prejudice in the cause; and if, thereupon, it shall appear to the Court that such juror does not stand indifferent in the cause, another juror shall be called or returned and be placed for the trial of that cause in his stead."

This statute was in extension, and not in repeal of the common law, relating to jury trials, because if this were the only mode of trying a juror's indifference, the party was entirely at the mercy of a corrupt juror who might be biased or bribed or have expressed an opinion, and yet if he denied it on his oath, the party could not contradict him by testimony, and must abide by it.

A strongly analogous case is presented in the Statute of Mass. 1807, chapter 75, for limitation of real actions, which provides

that no person shall be allowed to sit on a jury for trying the value of buildings, where such person is interested in a similar question, but the same shall be good cause of challenge to such juror. In *Jeffries v. Randall*, 14 Mass. 205, the Court say, "This provision extends to all cases where the juror is liable to be interested in a similar question, although no action is pending to which he is a party, in which a similar question may arise. It is apparent that the Legislature intended to exclude from juries in the trial of causes of this description, not only such as were interested, prepossessed with an opinion, or of kindred to either party, but had extended its caution to such as from their being liable to be interested in a similar question, might have their affections excited in the trial of a cause."

In *Commonwealth v. Ryan*, 5 Mass. 90, a challenge was made to the jury, in an action where the forfeiture went to the County on the ground that the jurors had an interest although almost indivisible. The Court set aside the challenge solely on the ground of necessity, because no jury, not inhabitants of the County, could be returned, and the cause could not otherwise be tried. They say, "A remote and small corporate interest is no legal objection to a juror's trying a case, if by the necessary construction of the law the cause could not otherwise be tried."

In a case in New York, 2 Johns 194, where one brought an action *qui tam*, to recover a fine, half of which went to the inhabitants of a particular town, all the jurors belonging to that town were challenged and set aside. The Court declared, that "the jurors must be *omni exceptione majores*, free from every objection, and wholly disinterested."

These decisions relate to matters of pecuniary interest, it is true, but they go directly to illustrate the principle. If the interest of a few cents, or the fraction of a cent is held sufficient to affect the oath of a juror to decide impartially, will not the affections or prejudices of a juror, go much farther, especially in the relation one Mason stands to another?

In the *Commonwealth v. Knapp*, 9 Pick 496, a juror having said his prejudices were against the prisoner, but that he had no definite opinion, and should be governed by the evidence, was set aside for cause. In the same case, a juror, on his *voire dire* was asked if he had formed such an opinion as incapacitated him from giving an impartial verdict, replied, he did not know how much he might be influenced by his preconceived opinion. This was held a sufficient cause for challenge.

In 14 Mass. 207, the Court say, "If we had evidence that the juror acted under the influence of improper motives or principles, we should set aside the verdict."

All these cases go to show the extreme jealousy of the law in guarding against any prejudice, bias, prepossession or in-

fluence on the mind of a juror, and they certainly apply with increased force, to the influence and bias, between one Mason and another Mason, growing out of the Masonic relation and obligations.

We have seen what the Constitution of the United States and of this state say upon the subject of an impartial jury. Are they less emphatic in this respect, than the Constitution of Great Britain? If not, then the construction put upon the British Constitution, by Lord Kenyon, is directly in point in this case.

In 4 Term Rep. 289, *King v. Joliffe*, in the year 1791, Lord Kenyon, Chief Justice, says, "It is the pride of the Constitution of this country, that all causes shall be decided by jurors, who are chosen in a manner which excludes all possibility of bias, and who are chosen by ballot, in order to prevent any possibility of their being tampered with. But if an individual can break down any of those safeguards which the Constitution has so wisely and so cautiously erected, by poisoning the minds of the jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts." In what way could an individual more secretly and effectually poison the mind of a juror, at the moment he was about to decide a case, than to have it in his power to make to the juror a secret sign of fraternal relationship, or a sign of distress, which the juror had previously taken an oath to obey, and to fly to the relief of the party making it?

The principles governing the impaneling of a jury are well laid down in 4 Bacon's Abridgement, 561, Tit. Juries, E. 5, and are especially applicable to this challenge.

"Jurors ought to be *Omni exceptione majores*, free from all causes of objection from partiality or incapacity, consanguinity and affinity. Therefore if the juror be under the power of either party, as counsel, servant or tenant, he is expressly within the intent of the writ (and must be set aside.)

"So if he has declared his opinion touching the matter, or is a parishioner of the parish whereof the other party is parson, and the right of the church comes in question; or has done any act by which it appears that he cannot be impartial—these are principal causes of challenge.

"But though a juror has not given apparent marks of partiality, yet there may be a sufficient reason to suspect he may be more favorable to one side than the other, and this is a challenge to the favor. And in these inducements to suspicion of favor the question is whether the juryman is indifferent as he stands unsworn. For a juryman ought to be perfectly impartial to either side, for otherwise his affection will give weight to the evidence of one party, and an honest but weak man, may be so much biased as to

think he goes by the evidence, when his affections add weight to the evidence."

This is the peculiar danger of a partial bias, in the minds of even upright men, who are under Masonic oaths. The oath, the fraternal tie, and the inclination all lead to favor the brother, against one not a brother, and these can readily furnish a justification for doing so, even to a pretty conscientious man, who is a Mason, and is to decide a cause between a Mason and one not a Mason.

Relationship is a good ground of challenge. If the juror is related to either party within the ninth degree, though it is only by marriage, a principal challenge will be admitted. 1 Chit. C. L. 541. The juror being of kin to any member of a corporation who are a party is a principal cause of challenge.

Challenges are allowed where the issue concerns a city or corporation, and they are to make the panel, or where any of their body be to go on the jury or any kin to them, though the body corporate be not directly party to their suit. So where a Dean and Chapter brought an assize, a juror was challenged because he was brother to one of the Prebendaries. The importance of guarding a jury against every possible bias is strongly urged in the 13th of Mass Rep. 220. *Knight v. Inhabitants of Freeport*. The Court says: "Too much care and precaution cannot be used to preserve the purity of jury trials. We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due confidence to parties in the results of their causes, and every one ought to know that for any, even the least intermeddling with jurors, a verdict will always be set aside."

These arguments are drawn principally from analogy, but they fairly establish the position I started with, in the beginning, that there is nothing which ought to excite alarm or condemnation in a challenge of a juror for Masonic favor, any more than a challenge of a relative or any other person on the jury, whom the law suspects may be biased, in consequence of such relation, and of certain obligations to favor one party more than another. The principles, therefore,

which govern this challenge are fixed. The only question for consideration is their application to this case. Such application has been made in several decisions in courts in this country. I will now read from "Opinions on Speculative Masonry by James C. Odiorne," Appendix, p. 271. Trial of Elihu Mather for the Morgan conspiracy in Orleans county, New York, 1829, before Judge Gardiner. John C. Spencer, the special counsel, challenged Robert Anderson, a juror, on the ground that he was a member of the Society of Freemasons, to which the defendant also belonged. The juror himself was sworn as a witness before the triors, and Judge Gardiner charged the triors that if they were satisfied the juror had taken the Masonic oaths, as testified to, they would reject him. The triors decided that Anderson was not impartial. In the same case John Dolly was challenged and set aside for the same cause, after being sworn as a witness before the triors. In the trial of Elisha Adams, before a Special Court, Judge Nelson, at Lockport, N. Y., February, 1831, Andrew Estes, the first juror, was challenged as a Mason and set aside by the triors. George W. Rodgers, Caleb W. Raymond, and one other Mason who was on the jury, were also rejected. William Willson, a Master Mason, was called before the triors and swore he had forgotten his obligations; was initiated in Canada. The Court admitted this man, who was the only Mason on the jury. The jury did not agree. All but one were for bringing in a verdict of guilty. The juror who stood out was called for by the Judge, and Willson, the Mason, stood up! In other trials, for the abduction of Morgan, Judge Marcy now Governor of New York, repeatedly decided that a juror who is a Mason was incompetent to act impartially where the party was a Mason. No verdict upon the plainest evidence, could be obtained against the conspirators, where a Mason was left upon the jury, and they were almost invariably, the only jurors who held out against conviction.

In a civil suit between Richard Shaw and John C. Borden, before the Court of Common Pleas, Newport Count, Rhode Island, in November, 1830, Bateman Munro, a Mason on the

jury, was challenged, on the ground of bias, the defendant being a Mason, and the plaintiff, not a Mason. The challenge was made by George Turner, Esq., and was argued by Hon. Dutee J. Pearce, formerly Attorney-General, and then a member of Congress. The Court sustained the challenge, and the juror was declared not impartial.

I hold in my hand, gentlemen, a manuscript copy which has never been printed of the able and learned opinion on that point given by Chief Justice Joscelyn; and though he be a Rhode Island Judge, I should be proud to lay this opinion before you or any other jurist in the country. It will bear the closest scrutiny. It considers the question purely as a legal question, and ably vindicates the right every citizen has to be tried by a jury, free from the bias of Masonic brotherhood, and Masonic oaths. I think no sound lawyer could read that opinion without being satisfied that a challenge for favor to a juror who is a Mason, in a cause where but one of the parties is a brother Mason, is well founded in law, and in the fundamental principles of justice. The rejection of Munro, the juror, though he was a very respectable man, was fully justified by subsequent events, for when this same man was sworn before the Committee of the Legislature, to investigate Masonry, he there admitted that he had always used his Masonry as captain of a vessel, to aid him in smuggling.

The grounds upon which a challenge of this kind is sustained have been greatly misapprehended, and misrepresented, and the notions of proscription, persecution and disfranchisement are successfully held up to prevent a clear view of the question, in its legal bearings upon the right of a party to have his case submitted to a jury standing strictly impartial, and free from all reasonable suspicion of bias. There is no disfranchisement of jurors, as it is called, intended by a challenge to the favor in this, any more than in any other challenge for legal cause. The same settled principles of law are applied to this case, as one applicable to all other challenges for bias. The right is claimed, and nothing more, under the known laws of the land, to challenge a juror who is

under Masonic ties and oaths, in all trials where Masonic oaths and affinity may, by implication of law, create a bias, favorable to one party, and unfavorable to the other. We protest against the right of a class of citizens belonging to a secret society to have their causes tried by jurors standing in a sworn relation to them, which binds them to fly to their relief and to extricate them from difficulty. Even if this artificial brotherhood goes no further than to bias the juror to one party more than the other, where the testimony is balanced, still I contend it is a good ground for challenge, and gives an advantage over all others, to members of this society, which they have no right to claim over their fellow-citizens.

The COURT. The Legislature must regulate this. So long as the law did not disqualify a Mason from being a juror, he had a right to sit.

*Mr. Hallett.* Allow me to say, gentlemen, with the utmost deference for the Court, that the suggestion which has just fallen from his Honor, the Judge, is one of the popular misapprehensions in relation to this subject. It does not discriminate between the genus and the species, and receives as a general disqualification, what is only intended for an exclusion in particular cases. A Mason is not to be held incompetent as a juror, in all cases, but as laboring under a bias, which disqualifies him in particular cases. The Legislature have nothing to do with this question as applicable to individual cases. They could not, without manifest injustice, make a law to exclude a particular class of citizens having the legal qualifications, from being jurors at all, and the principles of law are already sufficient to exclude any juror, where there is undue favor, affection, prejudice or bias. The application of these principles depends upon each particular case. Masons, therefore, I repeat, are not to be excluded from all juries, because they are Masons, but they are to be excluded in all cases where the relation they stand in to a brother Mason on trial may induce an improper bias, or affection, so that even an honest man may be subject to bias as a juror and to think that he goes by the evidence only, when th



weight of evidence is increased by the secret obligations he has assumed to favor one of the parties. Were it proved to you, gentlemen, that a juror had made an unqualified promise to one of the parties in any cause, to fly to his relief, and help him out of difficulty, would you hesitate to pronounce him not impartial; not indifferent? Does a juror satisfy the law, who stands so that, all things being equal, his mind is made up before hand, to incline to one party more than the other? Are men, not Masons, obliged to take this risk against themselves and in favor of those who are Masons, in all cases where testimony is equally balanced?

The suggestion of disfranchisement to the juror is therefore wholly unfounded. Members of the same religious society with one of the parties are incompetent jurors, and yet no religious society calls this a disfranchisement. In the case of Rev. Dr. Phillips, in New York, an indictment for conspiracy, members of the Presbyterian Church, to which the prosecutor belonged, were held incompetent jurors.

The presumption of bias in the mind of a Masonic juror is founded on the circumstance of the general favor he is under obligation to extend to a particular class of persons, and not on the consideration of the juror's motives, as a juror. Hence it no more disfranchises a juror to prevent his sitting in a cause where he may favor a Masonic brother, than to prevent his sitting in a case where he may favor a natural brother or other relation. In both cases the juror may act honestly. There are Masons who would be above this bias. There are also natural brothers, who might safely be intrusted to decide a cause between a brother and a stranger, but does that prove the principles of the law to be unjust, which exclude a brother from the jury, when his brother is a party? The policy of the law will not trust him. It will not expose him to a conflict between his duty and his affections, and much less ought it to expose him to a conflict between his Masonic and civil oaths, which are incompatible.

The brother Mason is bound by express oaths and promises to obey all signs and summons from his brother Mason—to

fly to his relief, at the risk of his life—to apprise him of danger, to answer the grand hailing sign of distress, which may at any moment be made in open court, unobserved, between the party and a juror and to espouse his cause, so as to extricate him from any difficulty, right or wrong.

The natural brother has made no such promises as these, and yet he is excluded from the jury, when his brother is a party. The case is precisely parallel. The natural brother is not disqualified as a juror, because he is a brother, but because his brother is a party to the suit. It is not a general but a particular exclusion; not an objection to competency at large, but to qualification in a particular case. Why then should Masonic brothers insist upon the right of sitting on juries to decide causes where their brethren are concerned, any more than natural brothers should? If it disfranchises the Mason to exclude him, and implies aught against his fairness as a man, does it equally implicate the natural brother to exclude him?

I might enlarge upon the relation of Master and Servant in which each Mason, by his oath to obey signs and summons, etc., stands to another Mason. That relation in law excludes a juror, on the ground that the juror must not, in any case, be subject to the command of either party, and bound to obey him.

Neither is the sitting of a juror in any cause, a franchise, a privilege; but a duty, a burden imposed by the law, as you gentlemen have found the burden imposed on you of sitting as triors. If to sit on a jury be a privilege, a franchise, why are certain classes of citizens exempted from the service, as a special favor? Hence it can be no disfranchisement to set a juror aside on legal grounds of challenge. The franchise consists in the constitutional and legal right of the party to be tried by an impartial jury, free from all bias.

Taking then the principles and analogy of the law governing challenges of jurors, and assuming as a fact that Masons are to be subjected to the same disabilities, and no more; and are bound by the same liabilities and no more, when before

a jury, or on a jury, as are all other citizens, in all other relations, it then must follow that a Mason, who is a party to a cause, has no right to avail himself of the sworn services, or the undue bias which may determine a Masonic juror in his favor more especially in a cause nicely balanced between a Mason, and one not a Mason. It also follows, that as a juror can have no interest in the result of a cause, so he ought to have no secret motive operating upon his mind, and inclining him to favor one party more than another; and, therefore, he has no right as the member of a society whose brother members he has sworn to aid, to sit on a jury, where, by possibility he may feel bound to comply with that obligation to the injury of another party. So long, therefore, as men free from such secret obligations and affinity can be found to decide a cause, it is the right of a party, not a Mason, in a suit with one who is, to have a jury of men who have taken no oaths to each other, which are not openly enjoined by the laws of the land.

Gentlemen triors, I thank you for your patient attention. Though the main question involved in this challenge cannot, I apprehend, be decided on by you under the testimony, yet I felt unwilling to have a verdict made up by you, without some statement of the legal grounds on which the challenge was made. Those grounds, I believe, will bear a close investigation. They present nothing novel, except the new application of old principles, and they involve a most important right to the citizen; the right of trial by an impartial jury. It is exceedingly important that the public confidence should not be destroyed in this civil institution, the value of which, like all others we enjoy, depends upon public opinion.

*Mr. Parker.* I did not intend to go into an argument, in reply to the elaborate argument which has been addressed to the gentlemen triors on the other side. The objection had been taken wholly unexpected to me, and I do not conceive that the evidence in the case is sufficient to sustain the objection at all in this case, if indeed, it could be sustained in any case. The counsel on the other side did not object to the juror

because he was a Mason, but because if he is a Mason, he might be biased by the obligations he has assumed as such. Now all this argument amounted to nothing, if the fact was not proved that the juror was a Mason. The gentleman had failed, in his first step, and it was unnecessary to follow him beyond that. I agree to the law he cited, with the exception of the principle that suspicion of bias, is to be taken as sufficient proof that the juror does not stand indifferent. But there is not a tittle of evidence that the juror is a Mason. The gentleman admits it, and withdrew his objection for that reason. Besides, if he were, to whom does he stand related as a Mason in this case? The commonwealth is the party, and the commonwealth is not a Mason. If the doctrine contended for were insisted on it appears to me we must exclude Anti-Masons as well as Masons, and we should soon be unable to try a cause, for the want of a jury who belonged to neither of these classes. The relation, so much insisted on, if it applies at all, must apply only where that relation subsists between a juror and one of the parties. It has nothing to do with this case. It was a novel scene, and one which the law could hardly have contemplated, that a citizen, who was called as a juror to try others, should himself be put on trial. He should not, however, as he already intimated, go into the argument because the objection was wholly set aside, by the fact not being proved on which alone the objection could be founded.

JUDGE THACHER (to the triors). I regret the necessity which has rendered it my duty to take the gentlemen from their business to impose an unpleasant burden upon them, but so far as the public justice was concerned. I am happy to have their aid in the important duty of impanelling a jury. The impartiality of juries should always be guarded with a watchful eye. The proceeding is a novel one and I know of no case in this commonwealth in which triors have been demanded by a party challenging a juror. The statute points out one mode of testing the impartiality of a juror, on his own oath, but it does not exclude the mode plainly laid down by the common law, if the party claims his right to that mode.

The defendant's counsel elected that mode to prove the bias of the juror, by testimony *aliunde*. The common law being in force here, the only proper course appeared to be to appoint triors, as is the practice under the common law in New York, and you, gentlemen, were selected for that purpose, no juror having been impanelled. The first witness called did not establish the fact that the juror was a Mason. Mr. Hallett then offered Mr. Sargent, the juror, as a witness, but the Court overruled it, on the ground that it was calling upon him to disparage himself. You have heard a long argument upon the grounds of this challenge. The gentleman disclaimed altogether challenging the juror as being incompetent, because he was a Mason, and yet his only objection to him, in this case, is the bias, founded on obligations he is supposed to have taken as a Mason. Is not this saying in one breath what he takes back in the next? But there is no evidence that the juror is a Mason, and if there were, I know of no law that excludes him in this case.

#### THE VERDICT OF THE TRIORS.

An officer was sworn, as in jury trials, to take charge of the triors, who retired to deliberate. They were conducted into court by the officer, having been out two hours and twenty minutes.

*The Clerk.* Have you agreed, gentlemen?

*Mr. Pickering.* We have. We find that Mr. Sargent is not disqualified.

*The Clerk.* Gentlemen, the Court affirms your verdict. Daniel Sargent, the juror was then called and sworn. Horace Baker was next called and sworn as a juror.

*Mr. Parker* moved that the triors be now discharged, as two jurors were impanelled, who must sit as triors if required. The triors were thereupon discharged by the Court, with thanks for their services, and the Clerk was directed to pay their fees.

*October 14.*

The jurors on the panel, were called and sworn without ob-

jection from either party. They were Daniel Sargent, Foreman; Horace Baker, Levi L. Cushing, Thomas Cushing, John H. Osgood, John M. Sexton, William W. Simpson, William T. Thayer, Gardner Tufts, Levi Warren, George Williams, Justin Andrews.

#### THE QUESTION OF EMBRACERY.

*Mr. Parker.* The cause now to be submitted to your consideration is one of a novel character in this county, and it is creditable to our citizens that no former indictment for this offense can be found on our records. In other countries, the offense is not novel. It is indictable by the common law, and also is prohibited by English statutes enacted centuries ago. There are also statute laws against it in some of the United States. It is a crime against public justice: it poisons the very fountains of justice.

If there be anything valuable in our institutions, it is the trial by jury, a privilege deemed so important as to be secured to every citizen in every case, civil and criminal, by the constitution of this commonwealth. But to be of any value, the trial by jury must be carefully guarded from sinister influence and corruption. The lives, liberties, property and reputation of our citizens are protected by juries: all that is dear to us depends for its preservation upon the integrity, intelligence, firmness, and honest decisions of jurors: and I hope one advantage at least will result from this trial, the diffusion of the knowledge among the community of the rights, duties, privileges, and liability to punishment for misconduct, of the jurors themselves, and of the enormity of the offense of attempting to corrupt them, all which will probably be discussed before the trial is over.

The technical name of this offense is embracery, a term not very well understood out of courts of law, but very well understood by lawyers; and it may be useful at the opening of this cause to you, to give you clear ideas of its nature and criminality, by which you will be enabled to form an opinion whether the conduct of Mr. Clough, the defendant as set

forth in the indictment, which I expect fully to prove by the evidence I shall introduce, amounts to the offense and subjects him to your verdict of guilty.

I shall forbear, gentlemen, to make any unnecessary allusions in the trial of this cause to any facts or any feelings, not belonging to it, and confine myself wholly to the law and the testimony. It seems to be a too fashionable practice of late, to introduce into trials many things which do not belong to them, and much time is lost and much of the public money wasted, by the excessive duration of trials, the length of which results from the irregularity of introducing foreign matter. The public prosecutor is instructed to save to the community all possible expense, and I have ever confined myself within the closest bounds of duty. I am aware this case is supposed to touch some of those party-strings now in motion, and which at the present time agitate the public mind, and are particularly interesting on the eve of the political struggle. But whoever expects that, on the part of this prosecution, any partisan feelings, any political partialities, any private or personal motives are to be indulged, will be much mistaken. I have come here, as I suppose you, gentlemen, have come, with the single motive of discharging a public duty, a duty each of us owes to the commonwealth, to all the people of the commonwealth; we are here to do the solemn business of this court; to investigate a serious and highly important charge presented by the Grand Jury against this defendant, a heretofore respectable citizen, and always a warm and honest partisan, for trial before this tribunal of justice. We have nothing to do here with politics or parties: we are ministers of the law, whose conduct is to be regulated solely by our oaths and our consciences: we are not allowed to indulge our feelings, our partialities, our antipathies, our prejudices or our wishes. Justice is impassive; it has no passions; it belongs to no party. It seeks only for truth, and when it finds it, it speaks the truth, and the whole truth, and nothing but the truth, whoever it may affect, and administers the law upon that truth, in humble imitation of the Deity, "without respect of persons."



The course I have marked out for myself, on this occasion is, first, to read to you the definition of embracery, from books of the best authority—both English and American, and secondly, to open the testimony by a concise narrative of the facts I expect to prove in support of the indictment.

The authorities I rely upon, are these—

4 Black. Com. 140. Embracery is an attempt to influence a Jury, corruptly to one side by promises, persuasions, entreaties, money, entertainments and the like.

1. Russell, on crimes, 277. Embracery consists in such practices as tend to affect the administration of justice by improperly working on the minds of the Jurors.

1 Hawkins Pleas of the Crown, chap. 85, Sec. 1. It seems clear any attempt whatsoever to corrupt or influence or instruct a Jury beforehand, or any way to incline them to be more favorable to the one side than to the other by money, promises, letter, threats or persuasions, except only by the strength of the evidence, and the arguments of Counsel in open Court, at the trial of a cause, is an act of Embracery, whether the Jurors give a Verdict or not—or whether the Verdict be true or false. The law prohibits everything which has the least tendency to corrupt a Jury, or influence them otherwise than by evidence and the obligations of conscience.

Hawkins chap. 85, Sec. 7. An offence of this kind subjects the offender to an Indictment or Action in the same manner as all other kinds of unlawful maintenance do by the Common Law.

Bacon's Abridgt. Juries M. 3. Applications of this kind to a Juror are to be watched with a very jealous eye. The rank of the applicant may give to them, however cautiously expressed, a commanding influence over the persons to whom they are addressed.

In 11 Mod. Rep. 118, *Herbert v. Shaw*. Powell, Justice, said he remembered a case in the Court of Common Pleas, where a stranger wrote to a Jurymen to consider that the Plaintiff was a poor man, for which a new trial was granted, and the writer taken up and committed.

I cite the following case with the more satisfaction, because I was referred to it by the argument of the opposite counsel before the Triers.

In 4 Term Rep. 289, *King v. Joliffe*, Lord Kenyon said, "Publishing the papers in question during the pendency of the cause at the assizes, and in the hour of trial is not a minor offense. It is the pride of the Constitution of this country that all causes should be decided by jurors who are chosen in a manner which excludes all possibility of bias, and chosen by ballot in order to prevent any possibility of being tampered with. But if an individual can break down any of those safeguards which the Constitution has so wisely and so cautiously erected, by poisoning the minds of the

Jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts. If the publication be brought home to the defendant he has been guilty of a crime of the greatest enormity."

1 Burrough 510, Rex. v. Martha Gray. A libel had been published just before a trial with intention to influence the public and the jury. It was stated by the counsel on one side, and consented to by the counsel on the other, that such practices were not only a contempt of court and a high misdemeanor but might invalidate the verdict—and the trial was put off on account of said libel, and the publishers prosecuted.

Moor's Reports 815, Jepps v. Tunbridge and Wiseman. A question upon the title to real estate. The tenant caused a letter of instructions to be given to one of the jurors. It was read by one or all the jurors—and was held Embracery and punishment followed.

Noy's Reports 102. Plaintiff made a brief of his case and delivered to some of the jurors before their appearance for their instruction—held to be Embracery and the party fined and censured.

The King v. Opie. 1 Saunders 301. This was a case of information—defendant's were found guilty. Saunders moved in arrest—Lord Hale refused to hear him, said he should bring error. Saunders in his note, says it is an offense which deserves severest punishment, and refers to the English statutes restraining Embracery.

American Cases. 5 Day, Conn. Grannis v. Brauden. A witness talked freely with a juror about the merits of a case. A motion for a new trial or an arrest was made, because the Court would not compel the witness to testify to that conversation. He said it would accuse himself and refused. Court said it would, it was Embracery "a crime of deep hue, polluting and corrupting the source and foundation of justice," and that it was immaterial whether Embracery was committed by persuasion or bribery. Page 274

5 Cowen 503. Gibbs v. Dewey. The Court after defining the cause of Embracery, say a witness has no right to deliver any paper to the jury, without the direction of the Court.

The act is as criminal in a witness as in a bystander.

Any attempt by a witness to influence a jury in any other way than by the open delivery of his testimony is improper, and in judgment of law corrupt.

In New York Embracery is an offense at common law and by statute.

7 Dane's Abridgment 10. Embracery is an offense against public justice and an offense at common law.

Such being the nature and criminality of the offense of embracery, we are now to consider the facts set forth in this indictment, and proceed to the evidence relied upon, on the

part of the prosecution, in support of the charge against the defendant.

I shall read to you a record of this court by which it will appear that at the last July term there was an issue tried by the jury of trials, between the commonwealth by indictment for a libel upon Mr. Samuel D. Green, on one part, and Charles W. Moore and Edwin Sevey, printers and publishers of a newspaper called the *Masonic Mirror*, on the other part. That trial was begun on Saturday of one week and terminated on Saturday of the succeeding week, occupying the court seven days. The arguments of counsel were closed about two o'clock on Friday, the nineteenth day of July, and the court adjourned to half past three in the afternoon, at which time the Judge was to deliver his charge to the jury. It will appear by the record that Mr. Nathaniel Frothingham was one of the jurors impanelled to try that issue. Mr. Clough, the defendant in this cause, appeared to feel interested in that trial, and attended, I believe, every day. In the course of the trial he was called as a witness in behalf of the commonwealth, and testified in the cause, and, when about to leave the witnesses' stand, he voluntarily declared with much emphasis, without any interrogatory calling for the declaration, that if they wanted to know whether he was an Anti-Mason, he was. Mr. Green was attacked in the libel as an Anti-Mason, and his moral character was much blackened in the publication. The witnesses against him were Masons, and some of them persons more or less alluded to in the celebrated Lockport trials in relation to the abduction of William Morgan. The witnesses in favor of Mr. Green were mostly Anti-Masons, and the trial took such a course as almost to indentify the defendants with the Masonic fraternity, and Mr. Green with the opposite party of Anti-Masons, and much party zeal was manifested both by the witnesses and the counsel, and a great deal of contradictory and unreconcilable evidence introduced.

I expect it will further appear in evidence that Mr. Clough had for many years been acquainted, first, with Mr. Frothingham's father, and afterwards with Mr. Frothingham himself;

that he lived in his neighborhood; that in former times, when party spirit ran high between Federalist and Republicans, they belonged to the same political party, and often met together discussing the politics of the day; and that during a large part of the time of the long trial of Moore and Sevey in this hall, Mr. Clough sat in one of the settees within four feet of Mr. Frothingham's seat among the jurors, and in full view of him, so that he must necessarily have seen and known Mr. Frothingham to be on that jury. It will also appear in evidence, that Mr. Clough came to court that Friday afternoon about half an hour before the court opened; that when Mr. Frothingham came into the door, Mr. Clough immediately called him to him and gave him a pamphlet, and requested him to read that, and let the jurors read it—and that Mr. Frothingham took it and carried it into the jury seat, and deposited it in his hat; that the charge was then given by the Judge, and when the jury went into their room, Mr. Frothingham carried the pamphlet into the jury room with him.

I shall identify that pamphlet, and prove it to be the one mentioned in the indictment, and shall read it to you to show you its Anti-Masonic tendency and object, and its manifest bearing on the questions and evidence deemed important in that trial.

Having proved these facts, nothing will remain but the inquiry, for what purpose, with what motive, Mr. Clough selected that time, and place, to give Mr. Frothingham that pamphlet and why he did give it to him. The motives, intentions, designs of men, are not otherwise to be proved, than by the evidence of the facts, the words and actions, from which they are to be inferred. No one can discover otherwise what another man's motive is. We are obliged to infer from the overt acts and proved circumstances what a man knows, and what his designs are. In prosecutions for passing counterfeit money, knowing it to be forged; for receiving stolen goods, knowing them to be stolen, and in the like offenses depending upon the *scienter*, we are obliged to infer the guilty intention from facts and circumstances proved at the trial. In the

present case you will have to judge for yourselves, from all the evidence that will be submitted to you, under the conscientious responsibility of your own oaths, whether or not Mr. Clough had the intentions imputed to him by this indictment; if he had, he is guilty of the crime of embracery; if he had not, he is no more guilty than if he had given to the juror the New Testament, or a Newspaper having no allusions to Masonry, or the cause on trial.

I shall now call the witnesses.

#### THE WITNESSES FOR THE COMMONWEALTH.

*John Augustus.* Was in the gallery of the court room the day the judge charged the jury in the case of Moore and Sevey before the court was opened. Three persons, I think, were on the north side of the room. Three of the jurors were on the other side. Nathaniel Frothingham was one. They were in the jurors' seats. Mr. Clough was sitting on the same side, on the third settee at this end, Jonathan Pearce was with me in the gallery; saw Mr. Clough with a paper in his hand, a pamphlet like; he offered it to Mr. Frothingham. Mr. Frothingham took the pamphlet with reluctance, and I saw Mr. Clough point with his finger to a particular place. He kept his finger there some time. Mr. F. took it, moved very quick, and put it into his hat which lay on the window.

*Cross-examined.* Mr. Frothingham stepped out of the jury seat and he and Mr. Clough had some conversation I could not hear. He had a number of pamphlets of the same appearance. I saw him distribute them; saw him hand one to Mr. Fletcher; did not see Josiah Marshal or Ichabod Macomber: know them

both; did not see Mr. Clough deliver a pamphlet to any one, before he delivered it to Mr. Frothingham. After the pamphlet was handed to Mr. Frothingham, I saw Mr. Clough hand one to Mr. Fletcher. I did not know Mr. Frothingham at that time, nor whether any of them I saw were jurors. When I saw Mr. Clough deliver the pamphlet to Mr. Fletcher, I did not think it improper.

*Jonathan Pearce.* Was in the gallery with Augustus before the Court came in. Saw Mr. Clough and Frothingham walking about in the court room. Saw C. hand the paper to F. and Augustus spoke of it; said he did not think it was right; did not see Mr. Clough point to any part of the paper. Nothing was said between me and Augustus as to Frothingham being a juror.

*Mr. Parker* read the indictment against Moore and Sevey, and the record in that case.

*Nathaniel Frothingham* (recalled). Was one of the jury on the case of Moore and Sevey; have known E. Clough forty-seven years; used to be of the same political party years ago; the pamphlet containing the Dex-

ter letter is the one Mr. Clough gave me in the court room; saw Clough sitting on the front settee. He said he had got something for me. He put both hands into his pockets, then into his hat; he said, there, take that and read it, and let your friends read it. I immediately turned the paper over, saw what it was, and told him: Mr. Clough this comes with an ill grace from you to me. I then took it and put it into my hat and passed to the jury box. Mr. Clough had been in the court every day of the trial, and was sworn as a witness. He knew that I was one of the jury—could not help knowing it. I carried the paper into the jury room.

*Cross-examined.* I do not recollect that Clough pointed out any passage in the pamphlet. I took the paper as an insult from Mr. Clough, I being a Mason—not on account of being a juror; stated in court when I was about to be impanelled as a juror in the case of Moore and Sevey, that I was a Mason; have been a Mason 18 or 19 years; had seen the contents of that paper years ago, in print. When Mr. Clough gave the pamphlet he said he forgot that I was a juror. I had taken the paper, and told him it came with an ill grace; do not say that he did not ask me to return it; felt excited at the time, and considered it an insult to me as a Mason, not as a juror; did not object to taking it. Nothing was said relative to the case then on trial. I had a conversation with Mr. Clough at my place of business the day the trial was over. Joseph Leeds was present; found

Mr. Clough at my shop. He said he wanted me to give up the pamphlet, and if it was not given up Mr. Hallett told him he (Clough) would certainly be put in jail; told him I might be willing to give up the paper. I looked in my pocket and could not find it. He said he had asked me in court to give him back the paper? I said, "Yes, you did." I made a statement of the circumstances to Mr. Campbell in the jury room.

The COURT objected to going into the jury room.

*Mr. Hallett* thought he had a right to go any where, into a church, or a lodge, if it was necessary to get at the truth to clear his client. The place could not govern the legality of the evidence.

The COURT was unwilling to inquire into matters that took place in the jury room.

*Mr. Hallett* claimed the right to use all competent testimony without regard to any place where it happened, but proceeded on another point.

*Mr. Frothingham.* I first mentioned the occurrence to Mr. Allen before I went into the jury room; did not mention it to the judge at all. The paragraph that was not mentioned by the counsel, is the one with the square and compass [calling on Masons to vote for John Brooks]. A part of the paper handed to me by Mr. Clough had been read to me by the Counsel, as a juror, in the case of Moore and Sevey. It was read in the argument; did not know the fact when the paper was handed to me. The merits and demerits of Masonry and Anti-Masonry were brought up

in the trial. Clough said he wished me to read it, and let my friends read it. That was the whole he did say. If he asked me to return it, it must have been at that time, and before I put the paper in my hat.

*Mr. Hallett* now insisted upon asking what *Mr. Frothingham* told *Mr. Campbell*.

The COURT asked where the conversation took place.

*Mr. Hallett* said he did not inquire where. If it was legal evidence, the place could not make it illegal.

The COURT admitted the question in this form. What did you state to *Mr. Campbell* took place between you and *Mr. Clough*, when he handed you the pamphlet? *Mr. Frothingham*. I made the same statement as before, when I received the pamphlet—That when I came in he called me to him, and handed me the paper. I did state to

*Mr. Campbell* that *Clough* asked me to give it back to him, when I had turned and was going into the jury seat, before I had put it into my hat; the main question before the jury in the case of *Moore* and *Sevey* was the private character of *S. D. Green*. There was contradictory testimony on that point. The witnesses on one side were Masons, and on the other side Anti-Masons, and so Masonry and Anti-Masonry came up.

The *Foreman*. Some of the jury wish to know whether the witness means to say that *Mr. Clough* told him he had forgotten he was a juror. *Mr. Frothingham*. *Mr. Clough* said he wished I would give it to him back, as I was turning from him. I did not incline to give it back—at the same time he stated he had forgotten I was a juror.—Then he did say he had forgotten it? Yes.

*Mr. Parker* read to the jury the letter of *Samuel Dexter*, and the call upon Masons which compose the pamphlet handed to the juror by *Mr. Clough*.<sup>a</sup>

<sup>a</sup> In the year 1798 *Josiah Bartlett*, Grand Master of the Massachusetts Grand Lodge, published under his own name, in the *Mercury* and *Palladium*, an attack on the *Rev. Dr. Morse*, of Charlestown, for calling the public attention to *Professor Robison's* work on the connection of Masonry and Illuminism. To this Masonic attack *Hon. Samuel Dexter*, the great lawyer and advocate, replied, in the following article, the original of which we have seen in his own hand writing. The eagle mind of *Mr. Dexter* penetrated Masonry at a glance, and the biting ridicule here exhibited bears the stamp of his sarcastic powers.

TO THE GRAND MASTER OF THE GRAND LODGE OF FREE MASONS OF  
MASSACHUSETTS.

Sir,—As you have twice written to the public in opposition to *Professor Robison* and *Dr. Morse*, and a number of weeks having elapsed since your first favor, according to all the rules of epistolary etiquette, you are by this time entitled to an answer. This burden



## THE DEFENSE.

*Mr. Hallett* was gratified to be able to say to the jury that in this case there would be but little controversy between himself and the learned counsel for the Government, as to either the law, or the facts. The whole question for the jury to decide, would turn upon the application of the facts to the

I have taken upon myself, and shall now give you my opinion, and that of most of my informed friends. After having read your publications with some care, I confess, I am at some loss to determine their object. Thus much, however, I can discover, that your wish is to prevent the good effect of the publications of those gentlemen respecting Illuminatism. As I fully believe their writings are important warnings to the public, and have a tendency to prevent the evils which that Box of Pandora, the French Cabinet, is pouring upon the world, I must disapprove of your efforts, though I am not very apprehensive of their success.

Lest you should complain that my object is as difficult to discover as your own, I tell you explicitly, at the outset, that my intention is to endeavor to convince you, that after the concessions contained in your own publications, you are bound to desist from opposition, or relinquish all claim to the character of a man of probity and candor. In your last, you admit the existence of an order of Illuminatism in the following words.—“I pretend not to doubt the existence of this order, for there are documents in the Professor’s book which are satisfactory to render it probable;” and you express your abhorrence of their “reputed principles, and detested practices.” For what then are you opposing Professor Robison? Because like an honest man he states and proves the existence of a horrible conspiracy against government, morals, and religion, which you confess does exist, and guards the unwary from being seduced? Why are you opposing Dr. Morse? Because he first recommended this work to the perusal of Americans, and thus prepared them to resist the contagion of Illuminatism, and afterwards defended himself, when treated with scurrility for so doing? There can be but one answer to this, and that is, that Freemasonry was unjustly attacked, and you merely defended that. This is not fact in any sense, in regard to Dr. Morse, for he has never in the least degree implicated Masonry; on the contrary, he said every thing that an honest man could say to allay the causeless jealousy of some of the fraternity. Must you, in faithfulness to Masons, oppose the opposer of Illuminatism, after all you have said against it? If so, you are called by a higher authority, as a man and as a citizen, and in a voice of thunder, to abandon Masonry as an unjustifiable institution. If it be otherwise, let the Doctor quietly pursue his professional duties, for the crimes of Illuminatism are all that he condemns. But you have a singular objection against the Doctor. Without ex-

law, and whether the law as laid down for the prosecution, really existed in such form as to be at all applicable to the facts in this case. The acts and motive of the defendant were the main question for the jury.

The counsel on the other side had relieved him from the necessity of reading most of the authorities which he had con-

aminig his evidence or his arguments, you complain that he has "occupied more than eleven columns in the Mercury." This is a new mode of managing a controversy, to count the columns in successive newspapers, and learnedly publish the aggregate to the world to enable them to appreciate his arguments. But I do not object to this on account of its novelty, for I have a due regard for original genius and useful inventions. And who can doubt the utility of this invention to those who can count better than they can reason.

As to Professor Robison, he expressly acquits the three first degrees of Masonry of the charge of criminality, and you have told us that these are all that exist in this country. At least, there are no others under your protection. You say expressly, "I pretend to no regular information beyond what the learned Professor calls 'Simple Freemasonry.'" Will you undertake to say that the higher orders of which you confess yourself ignorant, cannot be corrupt? Will you oppose this naked assertion, confessedly founded in ignorance, to the talents and integrity of Professor Robison, which you have explicitly acknowledged, and to the testimony which he produces? Though among the unenlightened in Masonry, on this subject, I have equal information with all the most worshipful of your fraternity. And throwing out of the question such respectable authority and evidence as the name and documents of the Professor, let me ask you whether it be incredible that these workers of mischief, who are turning the world upside down, should avail themselves of the secrecy of Masonry to cover their conspiracy, and the general diffusion of it through all civilized countries, to inculcate their poison? And may I not add that the principle of levelism which enters deeply into Masonry, well comports with the hypocrisy of French despotism? Will you say, sir, that Masonry is incapable of being abused? In saying this you say that it is contemptible. If it possesses any character, any force or efficiency, it may be applied to produce mischief. Witness the modern abusive misapplication of the principles of civil liberty and philosophy. But I see the cause of your quarrel with the Professor. He is a Mason, and publicly confesses that Masonry is a frivolous institution. A deadly wound this, to the vanity of a man who hoped to derive some importance from being at the head of it in Massachusetts. If this be a mistake respecting the merits of masonry, and contrary to all rules of evidence, a man is not to be believed when he testifies against himself, yet remember that it does not render it

sulted as to the nature of the offense charged, by anticipating those authorities; and it gave him great pleasure to add, that the felicitous manner in which that gentleman conducted a public prosecution, with as just a regard to the rights and feelings of the defendant and his counsel, as to his public duties, also relieved him from a much more unpleasant task,

proper for you to attempt, from resentment, to prevent the good effect of his publication, to obstruct him in opposing vice, and guarding innocence against contamination. But as a misrepresentation here might impair the public confidence in the Professor, and prevent the complete good effect of his book, let me, for a moment, examine whether there be not every reason for believing the charge true. I will first consider what is known publicly of the institution, then hazard some conjectures as to what is said to be unknown. The world knows that masons have most windy titles, such as Most Worshipful, &c., &c., &c. It is known that their vanity prompts them to walk in formal procession, covered with trinkets that a well informed savage would blush to wear. It is well known that they have many symbolic figures which were highly useful before men could read or write, and therefore probably are yet convenient to many of the brethren. It is known that with all these trinkets and symbols they follow the remains of a brother, looking as wise as the bird of wisdom, which no doubt greatly comforts the ghost of the departed. It is known that on certain days they meet together and eat plentifully, and, if fame does not slander them, drink so too. But is it known that they have, merely as masons, one object of useful pursuit? Other societies are formed for promoting arts and sciences, agriculture, navigation, humanity, religion, &c. But this society, though claiming existence, if I am not misinformed by the brethren, for centuries before creation, and extended through almost all nations, has never yet produced any known good to the world. But we are told all this is answered by the claim of inviolable secrecy. Strange society that blazons its follies to the world, but buries its virtues in midnight darkness. But, sir, you have no secrets; but mere ceremonies. I say this on the testimony of most respectable men who are Masons. I say it on your own testimony. And can secret ceremonies save the institution from the charge of frivolity? Can you, by accumulating in secret more baubles and more follies excuse yourselves from the gewgaws and trumpery which are seen? I need not rest this denial of important secrets on testimony. The nature of the thing is stronger proof than witnesses can give. Amongst the weak and unprincipled, the intemperate, the offended, the revengeful Masons, which successive ages have produced, in all nations, and of all colors, it is impossible that any such secret should have been kept. And if this could be supposed, such a secret must be important to all men if important to any, and the withholding of it would be an instance of misanthropy

that of engaging in that kind of personal controversy which was but too common in the management of causes before a jury.

The offense charged was a novel one, derived from no statute and no practice in this commonwealth, and the jury must look carefully to the definitions of it, before they brought

disgraceful to the institution. I know it has been said that the sublime principles of the unity of Deity and moral philosophy, are involved in Masonry. But these are principles which at this time are peculiar to no society. In these respects all the civilized world are now Illuminati. On these subjects the blaze of light has obscured the twinkling of Masonry, and this claim of merit, on that ground, reminds us of a part of their own ritual, in which they burn candles to enlighten the meridian sun. As this ritual is said to be typical, perhaps this is the very thing intended to be symbolically represented.

In short, sir, if there be no very important reason for upholding masonry at a moment like the present, there is a reason against it. The system of the destroyers of human virtue and happiness is to undermine in the dark, the castle that cannot be carried by storm. Secret agency has overthrown all the republics of Europe, and an extended, secret, levelling, self-created society, without any valuable object of pursuit, and embracing bad characters as well as good, cannot be the subject of approbation of an anxious patriot.

The good man's fears will be still further excited in this day of dark intrigue, when all the fallen nations have first been secretly corrupted and prepared for destruction, by beholding an effect on this subject for which he can assign no adequate cause. Wonderful is the present revival and spread of Masonry, and invisible is the cause that produces it. The public papers have informed us of new lodges instituted, or about to be instituted in Norton, Franklin, Concord, Reading, Watertown, Oxford, Brookfield, and several other towns in this Commonwealth. I have no apprehension that these Lodges can become corrupt *en masse*, but they afford opportunity for selecting abandoned individuals to mislead the simple. They secure from public detection attempts at enlisting individuals in conspiracy, though such individuals should be incapable of being seduced. Thus, sir, I have done what Dr. Morse never did, I have ventured to call in question the utility of Masonry. Perhaps I may be ranked with the professor in this respect, and be charged with being an "illiterate enthusiast." Though innocent of the charge, I shall be proud of my company. But at least the Doctor, who has given no such offence, ought to be suffered quietly to enjoy the approbation of the wise and good, and of his own conscience, for his able vindication of himself and the Professor, without being disturbed by those who profess attachment to government and morals.

One further remark appears necessary to prevent misconception

this case under them. He should contend, first, as to the law,—that it was at best a matter of some doubt, whether the offense, as described in the indictment existed at all, or was punishable by law in this commonwealth. Second. That if it did exist, there could no more be constructive embracery than constructive treason, and that some overt, direct palpable act must be shown, which act must be a corrupt delivery

or misrepresentation. Though I cannot, without further information, respect Masonry, yet I highly respect many who have been initiated, and who are amongst my most valued friends. But it is a fact, unless all my experience deceives me, that the Masons who are most respectable as men, are the least attached to Masonry. Such men daily take occasion to excuse themselves from bearing any part of the apparent frivolity of the institution, and speak of it in the same terms with Robison. On the contrary, those who are very busy about Masonry, are generally men of light and frivolous minds dazzled by tinsel; and having no substantial ground for public respect, wish, by unfounded pretenses, to impose on the ignorant and excite the wondering stare of stupidity. S. D.

In the year 1816, it so happened that this Samuel Dexter was the Republican Candidate for Governor, and run against the Hon. John Brooks, the Federal Conditate. A few days before the Election, Major Benjamin Russell, then Grand Master of the Grand Lodge, came out in the Centinel with the following Masonic Proclamation; and Brother John Brooks was elected by a small majority.

[From the Boston Centinel, edited by the Grand Master of the Grand Lodge.]

TO THE MASONIC FRATERNITY.

BRETHREN,

It need not be repeated that the Internal Regulations of your benevolent Order exclude all discussions of political dogmas. But every Master knows, that his public obligation compels him to discharge the duties he owes to the State with diligence and fidelity.

When two candidates, therefore, present themselves for his suffrage, he is not bound to inquire to what party the one or the other belongs; but whether he is "a good man and true," and faithful to the Constitution which he may be called upon to administer. And, all other things being favorable, he is bound by every Masonic Obligation to give his vote for the one who is a Free and Accepted Brother, in preference to the one who is not.

Brother JOHN BROOKS, shall receive the vote of *A Master Mason*.

of money, or a written paper, having direct reference to the cause, and plainly intended to influence the juror. If any other act could come under the definition, it must be direct instructions, threats, solicitations, or promises. On this point only did he differ from the law as laid down by the attorney for the Government. Its application was not so general as that gentleman contended for. Third. That the paper delivered to the juror was a matter of long previous notoriety, having no direct reference to the case, and, fourth, that there was an entire absence of the motive indispensable to constitute this defense.

The doctrine of embracery had a bad parentage, for it originated in an odious tribunal known as the Star Chamber, in the time of Henry VIII., etc. The first case appeared to be the one cited in Sir Francis Moore's Reports, printed in 1663, in black letter, p. 815. In that case the Court held that for any one but a party to solicit a juror to appear, was maintenance, and for the party or any one else to instruct the jury by writing or parol, or to promise them a reward if they would appear, was embracery. This must be the same case, cited by the attorney for the state, from Noy, 102. In that case the juror was punished, as he should have been in this.

The distinction between maintenance and embracery was so slight, that no point would be made of that in the defense. Lord Coke's definition is this: "When one laboreth the jury, if it be put to appear, or if he instruct them, or put them in fear, or the like, he is a maintainer, and he is in law called an embracer, and an action of maintenance lieth against him and if he take money, a *decies tantum* may be brought against him. And whether the jury pass for his side or no, or give any verdict at all, yet shall he be punished as a maintainer or embracer, either at the suit of the king or party." 2 Coke's Inst. 369 a.

So, Hawkins 2, 411, describes the acts constituting embracery: any attempt whatsoever to corrupt, or influence, or instruct a jury, by money, promises, letters, threats or persuasions. Blackstone, Vol. 4, 140, says: "by promises, persuasions,

entreaties, money, entertainments and the like." 2 Russell 277 and 4 Bacon 598, are all the same. These are the English definitions. No case of a trial for embracery in this country has been found. The best definition is in 5 Cow. 503: "An attempt by either party or a stranger to corrupt or influence a jury, or to incline them to favor one side, by gifts or promises, threats or persuasions," etc., and in 13 Mass Rep. 218, it is laid down that "embracery is where one laboreth the jury or instructs them or puts them in fear." In that case a party interested had solicited a juror to find a verdict for one side, telling him he should have to pay the cost, if it went the other way. These facts came out in court, and the verdict was set aside, but no one dreamed of an indictment for embracery. That discovery was left for the present Grand Jury of this court.

Our fathers, though they brought the common law with them, did not adopt the Star Chamber doctrine of embracery, but on the contrary, they decreed, by an ordinance of the colony, that "whenever any jurors were not clear in their judgments or conscience, concerning any case, wherein they were to give their verdict, they should have liberty to advise with any man they should think fit to resolve or direct them, before they should give in their verdict." 2 Ancient Charters, 145.

This was going rather too far, but it might fairly raise a doubt whether by this act the common law of embracery was not done away, and therefore cannot exist here, because it has never been revived in practice or by statute. Under these authorities, and all that had been read on the other side, he should hold the jury, upon their oaths to decide according to the law, strictly to the definition of embracery as implying direct practices of influencing a jury corruptly, either by giving or promising money, or menacing them or persuading them how to give a verdict, or instructing them in the cause beforehand. The facts in this case would show that the act of the defendant did not come anywhere within the limits of this offense.



*Mr. Hallett* said he had a number of authorities to show that the behavior of the juror, Mr. Frothingham, in receiving the paper, was extremely reprehensible. It should be understood that this offense, if it be one, is not all on one side, and the juror who takes is even more culpable than he who gives. But that consideration did not properly enter into this case, and he would proceed to call the evidence.

*Major Benjamin Russell.* Was Editor and Proprietor of the Boston Centinel in 1816. As to the pamphlet handed to Mr. Clough with the Address "to the Masonic Fraternity," I never saw that paper before. [A file of the Centinel, for 1816 was shown him, and his attention called to the paper of March 30, 1816. On the first page of this paper is a large ship, called the Massachusetts. Beside it, in double columns, is the federal nominations for the ensuing election in April, two days after. John Brooks for Governor, &c. Directly under the ticket and as if composing an address to the people to accompany it, appears very conspicuously the address "to the Masonic Fraternity."] This is the same as that printed in the pamphlet with Mr. Dexter's letter, with the exception of one word, obligates instead of compels, in this sentence: "Every Mason knows that his public obligation obligates him to discharge the duties he owes to the State."

I did not write that. I unquestionably saw it. I recollect that it appeared. It was an electioneering article, written, I suppose, by my printer who was a Master Mason. I was Grand Master, then. Presume I saw it at the time. Did not disclaim it, in any subsequent paper.

Presume it was written in retaliation of some other article. It was circulated generally and approved. I am proud of it. It is bible doctrine, all other things being equal, to prefer a brother, and I am a little surprised that should have been brought against us: Considering the times, I think it was one of the fairest things that appeared.

*Mr. Hallett.* Was there an election pending, and was Samuel Dexter a candidate for Governor?

*Major Russell.* There was an election and it was a glorious triumph, too. I remember it well.

*Mr. Hallett.* That address to the Masonic Fraternity helped, no doubt?

*Major Russell.* I hope it did and hope it will again.

*Josiah Marshall.* Was in the Court House at the time referred to in the indictment. Saw Mr. Clough distributing papers (the Dexter letter) in the Court room, to several persons. He handed one to me and another to Mr. Macomber. My curiosity was excited by seeing him give one to a person I supposed to be a juror and I asked what it was and he handed me one. Saw no pointing to a passage.

*Ichabod Macomber.* Saw Mr. Clough handing papers round to several. He handed one to

Mr. Fletcher (Moore and Sevey's Counsel) Mr. Fletcher said he did not care to take it; he had read it twenty years ago. He delivered it to me, without any request on my part.

*Thomas Barnes.* Have seen some thousands of this pamphlet, which were printed for circulation in 1830, and have had a great number in my hands within a year, and have distributed many copies. Many were circulated at the laying of the corner stone of the Masonic Temple in this city. There are a great many Anti-masonic tracts which are circulated gratuitously. The object is to give information, on the subject of Masonry. Mr. Clough has often been employed to distribute these tracts. The Dexter letter was published in the Free Press, in 1830.

*Joseph Leeds.* On the day the Court rose, after the Moore and Sevey trial, was in Mr. Frothingham's paint shop. Mr. Clough was there. I asked Mr. Frothingham if he, Clough, did not ask him to give back the Dexter letter, when he handed it to him in the court room. Mr. Frothingham said he did. Mr. Clough asked him why he did not let him have it. Frothingham replied, it was best known to himself why he did not. I heard nothing of going to jail, or Mr. Hallett's advice. I might not have heard the whole conversation.

*Jeremiah Campbell.* Was one of the jury, in the trial of Moore and Sevey. Frothingham had a conversation with me, respecting Mr. Clough's handing him the Dexter letter.

The COURT. Was it in the

Jury room? It was.

*Mr. Hallett* hoped he should be not prevented from bringing out all the evidence in the defence.

The COURT asked what the object of the question was.

*Mr. Hallett* replied, to show the conversations the witness Frothingham had with others, at the time.

The COURT. Was the object to contradict that witness?

*Mr. Hallett* said his object was to get at all the conversations on this subject and the jury must judge whether it confirmed or contradicted the witness. He protested against being precluded from defending his client by any imaginary sanctity or secrecy attached to a jury room or any other place. Suppose a murder was committed in a jury room? Would the Court exclude the testimony, and suffer a man to be unjustly convicted for want of it?

The COURT. The fact was sufficiently established that Mr. Clough did ask F. to return the pamphlet. *Mr. Hallett* said he meant to make it stronger, and go a little farther. The COURT admitted the question, and the witness replied, Mr. Frothingham told me, when he went into the jury room, that Mr. Clough gave him the paper, which he showed there — that Clough, when he gave it to him, asked him to give it back—that he (Frothingham) refused, and said to Mr. Clough, I have got you, I have got you!

*Mr. Hallett.* That is what I wanted to bring out, to show the spite of the juror.

*John Adams.* Was printer of the Free Press, in 1830. The Dexter letter was then pub-

lished in that paper. It was also republished in the form here shown, and ten thousand copies struck off, for gratuitous distribution.

*Mr. Hallett.* I think, gentlemen of the jury, that I might with safety to my client, leave this case with you, upon the law and the evidence, without adding one word; but the human mind is so strangely constituted, and is governed by so many different influences in the process of arriving at conclusions from the same premises, that we can scarcely trust to our own convictions, much less can we judge of the convictions of others by our own. With the same facts before them, men come to exactly opposite conclusions. It is my duty, therefore, to take nothing for granted, but to urge upon you, all the considerations of importance, which this case offers, to compel you (upon your oaths to decide according to law and evidence) to acquit the defendant. I think I may fairly require it at your hands, as a duty you owe to him, to yourselves and to the public justice. I beg you gentlemen, for the sake of your own consciences, to be cautious how you suffer any course that has been taken in impanelling you as a jury, to prejudice you against my client. Even should any of you have been displeased by the challenge of one of your number, remember that displeasure will be no justification for a violation of your oath. Whatever wrong you may imagine others have done, it furnishes no excuse for you to do wrong. You have witnessed nothing in this trial, but the exercise of a plain legal right to secure an impartial jury; a right deemed of vital importance in the administration of justice, by a large portion of the community. I am happy in believing that from the manner in which this jury is constituted, my client has nothing to fear from that source. The question, and the only question for you to decide, is whether the defendant is guilty of this novel and almost imaginary offense, with which he stands charged.

I caution you against establishing a new crime, and a new punishment, in our code of laws. The common law is a sound rule of justice in most cases, when applied to civil matters,

but it is not fitted to the genius of our free government, as an interpreter of crimes. It is a bloody minister of justice, and it stands recorded as a disgrace to the British Criminal Code, that the catalogue of offenses, for which a citizen may be tried and punished, is almost unlimited. At the same time, it is honorable to our institutions, that so few acts which a citizen can commit, subject him to a charge for crime. Surely, then, you will not, on light pretences, add a constructive offense to our code, especially where its utility is so extremely questionable, as in this case. Guard the purity and impartiality of juries, as strictly as you please, but do not undervalue the general good sense and intelligence of juries, by supposing that they have no capacity or integrity to protect themselves, and that the law must interpose, on every slight pretence of an imaginary attempt to influence them, and punish the stranger, while the juror himself is suffered to go unrebuked. Such must be the inevitable consequence should you, by any unforeseen process of reasoning be brought to find a verdict of guilty in this case. The juror is a sworn officer of the court, and to him we must look for the responsibility of his acts, if he suffers himself to be tampered with. I think, therefore, that it should be the policy of the law to hold the juror accountable, and to resort to a punishment of those who may approach him only in plain, palpable cases of an attempt at corrupt influence and bribery. If there has been any offense at all committed in this case, it is the juror, and not the defendant, who ought to be on trial before you.

What then is the offense which must be proved to have been committed, before you can find a verdict of guilty? Has any real offense been committed? For, after all, it will be much safer, in a matter of so much doubt as this respecting there being any crime to commit, to look at the common sense of the case, instead of puzzling ourselves with loose definitions in old law books.

What has been done, gentlemen, to cause this formal indictment by a Grand Jury, the arraignment of the defendant, and all this ceremony of a solemn trial, as if some mighty crime

had been committed? Why, that venerable citizen there, honest, warm-hearted in every cause he espouses, accidentally handed to a man he had forgotten was a juror, and when the court was not in session, a printed letter, which had been in existence forty years, and an extract from a newspaper, published seventeen years ago—documents that had been circulated years before, all over the country, and of which hardly any man in the community who knows how to read, could be ignorant. And no sooner was it handed, than it was asked for back, the moment it occurred to him, not that he had committed an offense, but that he might be doing what was not altogether proper. Follow out the evidence as it has been forced from the reluctant witness, the juror who was so sensitive about his honor, and instead of finding a crime, it is difficult to detect even an indiscretion. I did think myself, at first that there might have been an indiscretion in the act, though I gave no such advice to the defendant, as the witness represents him to have stated—but the confessions drawn from the juror, who took the pamphlet, confessions forced from him, it would seem, only after he had found there were two witnesses to testify to his admissions that Mr. Clough had forgotten he was a juror,—these confessions, and all the facts in the case, do not leave even a charge of indiscretion against my client.

Nor has the slightest impediment been placed in the way of justice. It has rolled on as majestically and steadily, as if this little pebble had never disturbed its surface. Instead of inclining the juror to decide as Mr. Clough is supposed to have sought to influence him to do, the juror seems to have availed himself of it, to bring about an opposite verdict. I admit that in point of law, it is immaterial whether the juror was influenced or not, to constitute the offense of embracery, but it is material that there should have been some more weighty grounds than any the evidence discloses, to warrant this arraignment of a citizen as a criminal, who has lived nearly to the age of three score years and ten, without a stain or a reproach upon his integrity. It is no small matter for

a citizen to be thus lightly subjected to the public odium of an indictment, under pretence of vindicating the public justice, when it turns out that not the public justice, but individual rights and feelings have been wronged by this proceeding. The citizens have a right to be protected against such causeless prosecutions, for mere imaginary offenses, of the existence of which, not one in ten thousand, out of the legal profession, had any conception.

I know the maxim is that ignorance of the law excuses no man, but that ignorance must apply to a law which has been properly promulgated, and which the citizens have the means of knowing. One of the Roman emperors was famed for posting up his laws so high that the people could not read them, and then punishing them upon this maxim, *ignorantia legis neminem excuset*. This law of embracery is pretty much the same kind of a law. It has been buried up in the old law books, and after remaining disused in this commonwealth for centuries, it is now dug up, to charge my client with an offense he never dreamed of committing. And for this cause, he finds himself arraigned before you. If one of you had risen in your sleep and assaulted a man, and the next morning woke up and found yourself put on trial for the offense, would you deem it just that you should be held accountable for such an act? And yet in point of motive you would have been as guilty in that case, as the defendant is in this.

I protest, gentlemen, in behalf of every citizen of this community, against the irresponsible and causeless manner, in which that respectable and aged citizen has been dragged here, on such slight pretence, and arraigned before you as if he were a criminal. I attach no imputation whatever to the commonwealth's attorney. The Grand Jury, I am sorry to learn, find their bills at their own suggestion, or at the suggestion of others, and he but performs his duty as the prosecuting officer. It was reserved to the present Grand Jury of this court to establish the dangerous practice of indicting citizens upon the anonymous communications of secret, malicious informers. It has been stated to you, in the course of this

trial, that Mr. Clough was indicted in consequence of an anonymous writing, sent into the Grand Jury room, without their knowing whence it came. Upon this malicious representation, doubtless of some political or personal enemy, the Grand Jury proceeded to call the witnesses pointed out by the secret informer, all on one side, with no opportunity allowed to the defendant to save himself from the mortification and expense of a public indictment, and the first knowledge he has of the secret proceedings of his enemies against him, is a summons from an officer to appear and answer to a charge for having committed a newly discovered crime, which he and scarce any one else in the community, ever before heard of as being a crime.

Such a course of proceeding cannot be congenial to our free institutions; to a government of laws. What man is safe from disgrace, if upon the anonymous representation of a secret enemy, backed by one or more malicious or corrupt witnesses, he can be privately denounced to a secret tribunal like the Grand Jury, and the first knowledge he has of a suspicion of guilt against him, is a summons to answer to an indictment? True he can defend himself; he may be acquitted; but is it nothing to be indicted on a charge of violating the laws? Are experiments upon the feelings and characters of citizens, to be tried in this way, at the suggestion of every malicious informer? No, gentlemen; such is not the true spirit of the institution of a Grand Jury, and I appeal to you, to do what you can by your verdict in this case, to rebuke this new system of secret information, which has crept into our administration of justice, and which seems to be directed against a particular class of citizens.

The history of Venice, which once professed to be a republic, contains an illustration of this mode of anonymous prosecution, which appears to me not a little applicable to this case. A secret tribunal there had their lions' mouths, for receiving anonymous charges. Through this medium whoever was prompted to denounce any man, could gratify his malice, and the unsuspecting citizen suddenly found himself



under arrest as a criminal. Gentlemen of the jury, we live in a free country. Let us see to it that no lions' mouths are erected here.\*

But the main question for the jury in this case, is the acts and motive of the defendant. Without a direct, palpable, corrupt motive, you cannot find the offense charged and the motive you attempt to infer must be the only possible motive that can be inferred from the acts. You have nothing to do with suppositions or hypothesis. If you doubt that the motive was corrupt, you must acquit, for in this case, above all others, the motive is the essence of the offense. In a charge of homicide, the motive qualifies the crime, so that the act of killing does not constitute murder, unless the party had murder in his heart. In the offense of embracery, the motive cannot qualify the act, it either establishes or destroys it, for without the motive to corruptly influence the juror, the act is nothing. Look at the indictment. See in what round terms the defendant is charged here—"wickedly and unlawfully intending and devising to hinder a just and lawful trial—unlawfully, wickedly and unjustly—did corruptly move, desire, solicit and persuade—did unlawfully, unjustly, and corruptly, give and deliver, with the unlawful intention aforesaid."

This is the charge, and it is all made out of the little facts that a printed letter of Samuel Dexter, which was forty years

\* Moore, in his *Travels in Italy*, describes this contrivance of the Council of Ten. "The Ducal palace, at Venice, is an immense building, entirely of marble. Under the porticoes you may perceive the gaping mouths of lions to receive anonymous letters, informations of treasonable practices and accusations of Magistrates, for abuses in office." The same writer adds, "While you admire the strength of a constitution which has stood firm for so many ages, you are appalled at the sight of the lions' mouths, gaping for accusations, where innocence seems exposed to the hidden attacks of malice." John Adams, in his defense of the constitution (p. 66), speaking of Aristocratic Republics, alludes to this mode of anonymous accusation, as destructive in a free government. In Venice he says the lions' mouths and the inquisitors were engrafted on the Council of Ten. This terrible tribunal was sovereign in all crimes against the state. Three chiefs were appointed monthly, by lot, to open all anonymous letters (found in the lions' mouths), seize the accused, take examinations and prosecute the prisoner.

old, and had been distributed all over the country, was accidentally put into the hands of a juror, out of court, by a citizen, advanced in life, who had forgotten at the moment that the person was a juror, attempted to take it back, the moment that fact occurred to him, and who had no suspicion that it could be transformed into an offense—a letter which had no direct reference to the cause on trial, other than a general dissertation on Freemasonry and illuminatism, accompanied with a Masonic address from an old Centinel, exhorting the Masons to vote for brother John Brooks.

These are the facts, and out of these trifling circumstances has grown this public parade of a trial, and the attendant trouble and expense to the state, with the causeless injury done to the feelings of the defendant.

Had the principal witness for the Government, who prevaricated so much on this trial, told the whole truth at first, I cannot believe this indictment would ever have been heard of. There is a fatal variance between his testimony here, and the indictment, which is sufficient to destroy all the grounds of the prosecution. The indictment alleges that the defendant asked the juror to read the letter, and to let others of the jurors read it. This furnished some pretence to apply the delivery to the case on trial, but the witness, if he stated so to the Grand Jury, does not come up to the mark here. He now tells you the request was to read it and let his friends read it, meaning anybody. It surely did not apply to that jury, for it is certain there was not much friendship among them. Were citizens to be held to such strict construction as this, in their innocent intercourse with jurors, out of their seats? As well might a carrier who should leave the morning Advocate at the door of a juror be indicted for embracery, as this defendant. His Honor, the Judge, on one occasion delivered the book of statutes to a jury, by their request. He unquestionably did right, but if this is embracery that was. On Monday, while the sworn triors were hearing the evidence upon the challenge of one of your number, you saw a member of the bar go up

and address them. He forgot they were triors, and so far, in the same capacity as jurors. Was that embracery? I think, gentlemen, that an anonymous letter with as willing a witness as the juror in this case, might trump up an indictment out of that transaction. The Lion's mouth might do it!

*Mr. Hallett* here went into an examination of the testimony. He alluded to the self-contradiction of Mr. Augustus, who swore he thought it improper for Clough to deliver the pamphlet, though he then knew nothing about Frothingham being a juror. He pointed out the prevarication of Frothingham, in withholding the most material fact, and finally disclosing it, when compelled to do so; and inferred from this, and his exclamation, "I have got you," a malicious disposition to injure Mr. Clough. This fact and others also proved the terms on which the defendant and Frothingham stood. That Mr. Clough knew him to be a bigoted Mason, and being himself a man of good common sense, it followed that Frothingham was the last man on the jury the defendant would have attempted to influence by giving him a pamphlet against Masonry.

But the only tendency of the Dexter letter was to make Anti-Masons, and admitting the defendant's design was to make an Anti-Mason of Mr. Frothingham, it did not follow that could have influenced his verdict, because Anti-Masons on that jury consented to a verdict in favor of Masons. The whole act, therefore, admitting all that was alleged, amounted to nothing more than an attempt to make an Anti-Masonic convert by Mr. Dexter's letter. The counsel trusted the jury would not hastily make this a crime, because if they did, the Grand Juries and courts would be able to do no other business than to try Anti-Masons for attempting to make their fellow-citizens despise Masonry. He should certainly claim the honor of coming in for his share of this new crime!

In conclusion, gentlemen, I caution you against mistaking a gratification of private malice for a vindication of public justice. There is no possible good that can arise from fining or imprisoning a venerable citizen, on such pretences as

these; a man whose life has been marked for honesty and warm-hearted zeal in the cause of equal rights, and who, after serving the public faithfully, for seventeen years, in the customs of this city, has earned an honorable poverty, by giving up his bread, rather than surrender his principles, to secure the favor of men in power.

Gentlemen, I will detain you no longer. My client is safe in your hands.

*Mr. Parker.* Gentlemen: Although the evening has commenced, and we are to surrender this court room within an hour to some other assembly, I have deemed it proper not to avail myself of the liberty of the Court to postpone my address to you until to-morrow, as it is by some thought to be a disadvantage to a defendant to let the arguments of his counsel take the hazard of being forgotten over night, while those on the part of the Government after an adjournment, are pressed on a jury fresh and vivid in the morning just before they retire to deliberate on a verdict. And I am happy to think that my duty will not require me to detain you long, by the few remarks I intend to submit to your consideration. Notwithstanding the long and elaborate argument which you have just heard from the defendant's zealous counsel, I shall occupy half the length of time he has taken, because it will be wholly unnecessary. I consider the case a very simple one for your decision, there being no dispute about the principal facts, no difficulty as to the law, and no discrepancy in the testimony.

But before I proceed to the consideration of the merits of the cause, I beg leave to notice what has fallen from the gentleman about the Lion's mouths in Venice, as it implies an unjust imputation upon the administration of justice in this commonwealth. That invention was an instrument of tyranny and cruelty, and bears no analogy to the institution of a criminal prosecution by the Grand Jury. It is true, that the grand inquest do often proceed on anonymous communications, but never unless such communications point out the sources of lawful evidence, and they make no presentment

until known witnesses openly appear and give oath and testimony before them. The form of a grand juror's oath as prescribed in the statute is the guide to his duty, and he is "diligent inquiry" of offenses, as well as "true presentment" to make. Anything that comes to his knowledge in relation to crimes, from whatever source it comes, is to be considered, and if sufficient evidence can be found, the Grand Jury must proceed. But there is that regard to duty, that consideration of the rights of the persons accused, that intelligence, discrimination, and sense of probity and justice, prevailing always in some or all of the citizens who compose from time to time the grand inquest, that frivolous, unfounded, malicious, or unjustifiable presentments are rarely or never made. It is true persons are not unfrequently found not guilty by the jury of trials of the charges presented in indictments; but this is because the Grand Jury are obliged to proceed *ex-parte*; they hear but one side,—no explanations or evidence on the part of the accused; and do not undertake finally to settle the question of guilt, but only determine whether evidence enough, or probable cause enough, appears, to convince them that public justice requires the party accused to be put on trial. Besides, when they do make a presentment, is is formally made, the offense clearly, precisely stated, the accused has notice of it, he is called upon to make his answer, consulted as to the time when he will be ready for trial, and every facility and fairness extended to him to enable him to make his defense. Do these proceedings resemble the Lions' mouths, the practices of the Inquisition, the Venetian cruelty and injustice? In no particular—and you will not suffer yourselves to be prejudiced and misled by the gentleman's oratory or historical allusions. You will not favor this defendant upon any supposition, that the indictment against him and his trial, bear any analogy to proceedings which emanated in dark ages out of the Lions' mouths.

I will also notice before I go to the merits of this case, some statements of the defendant's counsel in relation to the law concerning embracery in this commonwealth, to which I can

not consent, and which may have a tendency to produce an improper impression on you. He has referred to a case argued and determined in the Supreme Court of this state, and reported in the book of authority. In that case, which was a civil action, the Court set aside the verdict and granted a new trial, because one of the parties unlawfully and privately practiced upon, and labored one of the jury, which was fully proved in open court, and yet that party was not prosecuted for embracery; therefore, argues the gentleman, in this commonwealth such conduct in a party is not an indictable offense: it was known to the Court, and the opposite party had proof of the fact, and yet no indictment. Therefore, it must have been the opinion of the highest tribunal in this state that such conduct is not indictable here!

This argument proceeds upon several fallacies: first, that every known crime is prosecuted, which is far from being the case, and, second, that nothing is a crime which is proved before the Supreme Court, and happens not to be indicted. In the trial of civil causes, the prosecuting officer is seldom there, unless engaged as counsel by one of the parties. If there, it is not his duty to make a complaint to the Grand Jury. He is not a grand juror to make inquiry after crimes: his business begins after a Grand Jury have ordered a bill drawn. And when in a civil suit, misconduct is proved in court, it is not the practice of the Judges to send for the prosecuting officer and call his attention to the offense, nor do they make any official communication to the Grand Jury.

Now, if the gentleman's argument proves anything, it proves too much. He certainly will not pretend that adultery is not a crime in this commonwealth; and yet not a term of the Supreme Court passes without some divorces being decreed for the cause of adultery, and still the adulterer and adulteress commonly remain unindicted. Of course, if his argument is sound, then he has proved that adultery is no crime, and is not an indictable offense in this state.

There was another inaccuracy in matters of law in the gentleman's argument. He urged upon you that there was a

fatal variance between the allegation in the indictment and the proof in this particular. The indictment states that Mr. Clough solicited Mr. Frothingham to read the printed paper and let others of the jury read it—whereas, the evidence proved the solicitation to have been “to let his friend” read it. Now, if there is any variation, still it is immaterial. To embrace one of the jury, is as certain an offense as to embrace them all: it is an equal crime. The intention was to influence the jury by irregular means: the manner was immaterial, whether by subjecting the paper to the eyes and understanding of each juror, or by communicating the ideas and arguments which were on the paper to the minds of the other jurors through their ears, by the statement of one or more who had read it. Besides, Mr. Frothingham testified there was one other Mason beside him on that jury; Mr. Clough probably knew it, and he was the friend alluded to by Mr. Clough. By the law, therefore, there is no difficulty established in this particular. But I am not quite certain whether Mr. Frothingham said friend—or friends; in the plural. If friends, then doubtless all the other jurors were intended by that expression. In point of law, this supposed variance is a matter of no importance.

I shall trouble you, gentlemen, with no further remarks on the law. The authorities I have read must have made you sufficiently acquainted with the nature of the offense; and the passage in Mr. Dane’s Abridgment, as well as common sense, must convince you that in this commonwealth, as in every other civilized community, such conduct as is imputed in the indictment to Mr. Clough, must be criminal, and indictable.

Every overt fact alleged in the indictment being proved, your principal duty will be to satisfy yourselves what was Mr. Clough’s motive and intention in giving Mr. Frothingham that paper. The case turns on this point. To ascertain it, there are many circumstances which clearly indicate it, and I will call your attention to them. You must derive your knowledge from this circumstantial evidence, which often is



the most satisfactory to the mind, that is found in judicial trials.

First. What is the tendency of the pamphlet delivered to the juror, accompanied with the urgent call to read it? It is an essay upon the follies and dangers of Freemasonry. What was against that institution was supposed to favor Mr. Green's character and credit, and support his side of the cause, and also to disparage Moore and Sevey, and thus operate upon and influence the jurors. Had the pamphlet that tendency? Most manifestly: it is apparent on the paper itself, which is written with talent, strong common sense, much biting sarcasm, and happily expressed ridicule, and sent forth into the world by an author of great celebrity and influence. You cannot doubt the tendency of that paper. If any additional proof was necessary, you have it in the fact proved here, that in that trial Mr. Hallett, who did the commonwealth the favor of arguing that cause in its behalf, with great skill, perseverance, power, and talent, in the course of his argument read passages from this pamphlet (not as evidence, but as weighty argument) to the jury he then was addressing. Here then we have his opinion of the tendency of the pamphlet, notwithstanding all his argument to the contrary to-day. It helped Mr. Green's side of that prosecution, it was introduced argumentatively against Moore and Sevey. It affected that issue: it had a bearing in that cause. This certainly is enough to prove the tendency of that pamphlet. You cannot hang a doubt upon this point. It certainly was well calculated to influence the jury to one side of that case, and against the other side, and this Mr. Clough well knew.

Next it is said that Mr. Clough is a man of good common sense, shrewd, and zealous. Now such a man does not act without motive. Whenever he acts, he has a design, an object in view, and his measures are well adapted to his ends. He is an active and warm partisan, and just such an one as would be very forward in promoting his party views, and ready to take measures to insure success to his party. These are cir-

cumstances worthy of your consideration. Then Mr. Clough had been an intimate political friend of Mr. Frothingham, meeting him every week, discussing party questions, for nearly twenty years. He might have thought himself justified in presuming to value on Mr. Frothingham's friendship, and upon his own personal influence upon Mr. Frothingham. He knew, too, that Mr. Frothingham was a juror then about to go out and decide upon the case. The feelings of Mr Clough were engaged in the trial. He attended every day, and when on the stand honestly and openly avowed to what side he belonged. What his wishes were as to the result of that trial, everybody in court clearly saw. They were abundantly apparent. His whole personal influence was thus brought and put forward to influence the juror. All these are circumstances throwing light upon his motives.

The time when to give the pamphlet, and when it was in fact given, was not the result of accident, but of calculation, of deliberation; the exact moment most proper to produce the effect intended; the time waited for, chosen, thought most appropriate, to influence the jury. What is the history of that pamphlet? Written more than thirty years ago for a special purpose, it is reprinted in vast numbers, in 1830, for another purpose, and sent to all the four winds of Heaven for distribution. It is now grown scarce again, remaining only in a few hands. Mr. Barnes had a few stowed away in his garret or elsewhere, almost forgotten, and Mr. Clough had a few. It is said Mr. Clough is an Anti-Masonic-Tract distributor. Be it so. Was there no other time to give such a tract to Mr. Frothingham than just at the close of a most tedious trial, lasting a whole week, in which a vast mass of conflicting testimony had been put in, and the arguments of counsel had occupied a day or two, upon all which the jury were to deliberate, with their minds distracted by opposite statements of witnesses and lawyers? Was such a time a season of leisure for a jurymen to quit the consideration of so difficult a case and read tracts and letters that did not relate to the case? Would any man of common sense at such time

(and Mr. Clough is a sensible man) urge upon a juror to read a book upon a subject not relating to the matters which then demanded the full exercise of all his intellectual powers? Can any one believe this? The time then, selected from among all the days of that week, from among the weeks, months, and years which have elapsed since the publication was printed, and since Mr. Clough has become a tract distributor, the time thus chosen clearly indicates the motive of the man who then gave it. Had it been given before that hour, it might not have got into the jury room.

There are also other marks of design. No other such tracts have lately been distributed. They were getting obsolete, and were hunted up for this occasion. Mr. Clough has not been proved to have distributed any other tract, nor at any other time. He brought it to the court house expressly for Mr. Frothingham at that time, to be read in reference to that trial, and gave it to the only man through whom he thought he could get it to the jury. Mr. Clough came before Mr. Frothingham that afternoon to the court room. Others also were there. There was no offer or attempt to distribute the pamphlet before Mr. Frothingham arrived. He called Mr. Frothingham to him, told him he had something for him. It was not ready for distribution until Mr. Frothingham came to him. No attempt to take it from his pocket, to search for it, nor to give it, till then. Mr. Frothingham was the first person he gave the paper to. Mr. Marshal asked for one because he saw Mr. Clough give one to a man on the jury. That circumstance excited his curiosity to see what it was. It is an after-thought, the suggestion of ingenious counsel, that it was given in common course of business as a tract distributor, and to Mr. Frothingham accidentally as to others. The time, the place, the circumstances, the manner, what was said, and what was done, all show the special, particular, intended object, and there were sagacity, shrewdness, calculation, object, motive, all manifested on the spot.

Besides giving the paper to him, why ask Mr. Frothingham to read it then? If necessary to give it then, why did not

Mr. Clough say, "Take this, read it at your leisure after the trial is over, when your mind is at ease and not occupied in the discharge of a very solemn and difficult duty"? Why not such the language of Mr. Clough? Because that would not promote his object. It would be too late for his purpose after the trial was over. Can anything be more plain and clear than this? Let me ask also who was the friend or friends Mr. Clough alluded to, to whom he wished Mr. Frothingham to give the paper. Nobody can doubt, under all these circumstances, he meant his fellow jurors. No other friend was named, no other persons were mentioned or alluded to. Such indeed are the strong and numerous circumstances manifesting design, calculation, object and motive in Mr. Clough, that to get rid of the effect of them, his counsel is obliged almost to stultify the old gentleman; to attribute to him forgetfulness, loss of memory, action without motive, zeal without knowledge, the infirmities of age, and so forth. But there is much inconsistency in this, because he himself avows his client to be a man of good common sense, honest, frank and warmly engaged in partisan warfare, and we all know that this latter description is just. No credit then can be given to the declaration that he had forgot Mr. Frothingham was a juror. He had seen him through the whole trial, every day, sat but four feet in front of him, frequently talked and joked with him in the court room before the Judge took his seat, on different days, and was familiar with him for years before. 'Tis impossible to believe he could have forgot a fact that stared him in the face so constantly. The excuse is lame, and was made only after Mr. Clough had received a severe rebuke from Mr. Frothingham. Then he perceived his mistake, and made the best apology he could think off, in the silly pretence that he forgot he was on the jury.

You are strongly urged to consider it as a fact of great importance, by Mr. Clough's counsel, that he asked Mr. Frothingham to give him back the paper, and a fact clearly indicative of his innocence. For myself, I think it of no importance in his behalf, but on the contrary, an acknowledgment

of his guilt. The offense had been committed. Suppose a man had forged a check, and fraudulently passed it, and got the money for it—and afterwards fearing a detection, and seeing that he had committed a crime, should succeed in paying the money back and getting back the forged instrument? Such a state of things would avail him in mitigation of sentence—but the act was done—it was complete—the crime was perpetrated, and the very repentance he manifested was proof positive of the deed. If a man had shot another, and got back the bullet, the evidence of his guilt might not be the same, but his criminality is in no wise diminished. To state a more analogous case, suppose instead of a printed pamphlet, Mr. Clough had said to Mr. Frothingham—“come here, I have something for you. Here is a fifty dollar bill. My wishes are for Mr. Green’s success in this trial. Do what you can for him, and get your friends on the jury also to do what you can for him.” And suppose Mr. Frothingham had replied: “This comes with an ill grace from you, my old friend and companion. You should have known me better than to insult me with a bribe in such circumstances! Do you think I am so sunk in depravity, so mercenary as to sell my honor, my conscience, my integrity, my oath, and do injustice for money? I despise you and scorn your money.” And suppose Mr. Clough had said: “Oh! I forgot you was a juror, give me back my money,” and Mr. Frothingham had said, “No, now I have got you, I’ll keep your money to give it to the Grand Jury as the evidence of your crime?” Can anybody think, that asking for the money back in such a case would be any proof of innocence? Surely not.

Gentlemen, I perceive my time is out. I have many other things in my mind to say to you, but I will not detain you. The cause depends upon what you believe was in Mr. Clough’s heart when he delivered this paper to Mr. Frothingham; what his motive and desire were. You have a responsible and important duty to perform. You are to act on your oaths and your consciences. You are not allowed to consult your feelings, to be governed by compassion, nor to excuse Mr. Clough

because he is old, or poor, or has been unfortunate. If he had the corrupt motive alleged in the indictment, you must say so; there is nothing in the language of the indictment deserving the severe remarks of the defendant's counsel. If Mr. Clough intended to bias and influence the juror contrary to law, in manner set forth in the indictment, such an act deserves all the epithets therein bestowed on it; it was "wicked," "unlawful," "unjust," "corrupt." But if under all the circumstances of this case, you can conscientiously acquit Mr. Clough, there is no man in the community that will be more ready to congratulate him than I shall be.

*October 13.*

JUDGE THACHER. The offense on trial is happily so rare in our commonwealth, that the learned attorney for the defendant seemed to doubt whether it had an existence, or was punishable by our law. You would therefore expect some information from the Court on that point.

If the indictment did not present to the jury a clear description of an unlawful act done by the defendant, it would fail in its office. It charges that Ebenezer Clough, with the intention to pervert the public justice, did, in the trial of an indictment in this court, at the last July term thereof, in which the commonwealth, upon the complaint of Samuel D. Green, for a supposed libel on him, was one party, and Charles W. Moore and Edwin Sevey were the other, deliver a printed paper to Nathaniel Frothingham, one of the panel of the jurors, who were sworn to decide on the issue, and did urge him to read the paper, and to let others of the panel read it, with the unlawful intent to influence and incline them, in that trial, to be more favorable to the side of said Samuel D. Green, than to said Moore and Sevey: which paper the juror received from the said Clough, and did carry into the jury room. This is charged to have been done by him knowingly, before the jury had been instructed by the court, and before they had retired to agree on a verdict.

I understood the indictment to describe an act, that fell

within the general description of the offense, which is known in law by the name of maintenance, "which is," says Sir Edward Coke, "the most dangerous enemy that justice hath." "It signifieth in law, a taking in hand, bearing up or upholding of quarrels and sides, to the disturbance or hindrance of common right; and it is twofold, one in the countrey, and another in the court." The third species of this offense, which is done in court, is "when one laboreth the jury, if it be but to appeare, or if he instruct them, or put them in fear, or the like, he is a maintainer, and he is in law called an embraceor, and an action of maintenance lieth against him." "Whether the jurie pass for his side or no, or whether the jurie gave any verdict at all, yet shall he be punished as a maintainer or embraceor either at the suit of the king or partie." Co. Lit. 368 a. The doctrine of the common law on this subject had been repeatedly recognized by our Supreme Court. From this passage, and from the various authorities which the industry of the learned counsel on both sides had read from books ancient and modern, I infer, and instruct you, that an act, unlawfully done to influence a jury, who are engaged in the trial of a cause, as by promises, threats, bribes, solicitations, or instructions, whether written, printed, or verbal, in disparagement of one of the parties and in favor of the other, was an offense against the law of this commonwealth.

The practice of the Court, both in civil and criminal trials, is founded on the law of the land, and is evidence of that law. And when the law orders a thing to be done, and the manner in which it shall be done, it implies a prohibition of everything inconsistent with it.

A strict adherence to the rules of law, both in respect to the forms of trial and the canons of evidence, is of the utmost importance, for the protection of the innocent, and the establishment of right. These rules may sometimes operate to screen an offender from justice. But the law less regards the punishment of the guilty, than the safety of the innocent. The wrongful conviction of an innocent man would be a stain upon the public justice.



The offenses having been described in the indictment, "fully, plainly, substantially and formally," and the party accused having pleaded to it, the issue is joined, and a jury is thereupon to be impanelled in court to try the fact in controversy, "according to the law and the evidence which shall be given to them."

The jurors, who are judges of the case, are returned by lot; but either party may challenge the jury for legal cause; either the whole panel, for partiality or other fault in the officer drawing or returning the jury, or any individual on the list: and it is the duty of the Court to be satisfied that the jurors are competent and free before they are sworn. But the presumption is, generally, that jurors are free, and it is for the counsel of either party to suggest any legal exception, or ground for doubt or inquiry.

The proceedings upon the first day of the trial must have impressed you with the importance the law attaches to the ceremony of impanelling the jury, who are to be as free and impartial as the lot of humanity will permit. The defendant's counsel challenged the foreman for favor, or bias, as it is called, upon the ground that he was a Freemason. He elected to prove the fact by other testimony than that of the juror himself. The act provides, "that the Justices of the respective courts shall, on motion from either party in a suit, put any juror upon oath, whether he is any way related to either party, or hath formed or given any opinion, or is sensible of any particular interest or prejudice in the cause; and if thereupon, it shall appear to the Court, that such juror does not stand indifferent in the cause, another juror shall be called or returned, and be placed, for the trial of that cause in his stead." Act of 1897, Chap. 140, Sec. 9. The defendant declined moving that the juror should be put on oath, and prayed that the fact might be settled otherwise. I had recently, in another trial, expressed my opinion on this ground of objection, and was desirous, for the satisfaction of the public justice, that it should be settled with the utmost solemnity. I therefore appointed two eminent counsellors, equally distin-

guished for their learning and integrity, to try the question, according to the method of the old common law. Although the process of appointing triors, to decide upon the indifference of a juror, was an entire novelty in the practice of this court, and was not known to have been resorted to in other courts of the commonwealth; yet, unwilling to deny to the citizen what might, in some cases, be deemed a valuable privilege, well known and described in the common law, and never expressly altered or repealed by the Legislature, I directed that course in this instance. The triors so appointed were sworn, and proceeded to settle the question, though with much reluctance on their part. The witnesses were examined, the counsel argued the question before them, and the Court expressed its opinion on the law, as in other trials, and they, after careful deliberation, returned a verdict, that the juror stood indifferent.

The members of the profession are undoubtedly competent, and most qualified to settle a question of this kind, and when called upon, it was considered a duty they owed to the law, which they, on their part, are indebted for much of the distinction they enjoy in the society of which they are members.

The issue being thus joined, and the jury or judges duly constituted, the accused may defend himself, in person or by counsel, in which latter case he communicates freely with his counsel, by whom his defense is presented to the Court.

In every case, the commonwealth must make good the charge by testimony of witnesses, sworn and examined in open court at the trial, and by other evidence, or the accused will be entitled to be discharged.

Either party may except to a witness. It belongs to the Court to determine whether a witness is competent, and testifies under a proper, legal and religious sanction, and to exclude all illegal and irrelevant testimony.

The jury are to hear the testimony, the arguments of counsel, and the instructions of the Judge in open court. Nothing is to be communicated to them, in evidence, or by way of argument, but in open court, and in presence of both parties.

No stranger may interfere in the trial of a cause to affect the event in any way. Such interference is never necessary for the ends of justice. Whatever is done, is to be done by the parties or by their counsel, and under the eye of the Court. No one may speak to a juror in court, without permission of the Judge. And after the jury have retired to agree on their verdict, they are still under the custody of the Court. No one may then have access to them in their conclave—not even the Judge, except in presence of the parties. “No communication whatever,” says the late Chief Justice Parker, in expressing the judgment of the Supreme Judicial Court, in the case of *Sargent v. Roberts*, 1 Pick. 337, “ought to take place between the Judge and the jury, after the cause has been committed to them by the charge of the Judge, unless in open court, and where practicable, in presence of both parties.”

So that the right of parties on trial, both in civil and criminal cases, are regarded, and protected with great jealousy from intrusion and interference. Justice, it is true, is, or ought to be, blind to the persons of the parties; but she sits in open court, where the light is freely admitted, and nothing is done or permitted to be done clandestinely. “Every human tribunal,” says Lord Erskine, “ought to take care to administer justice, as we look hereafter to have justice administered to ourselves.”

The jury would next consider whether the accusation was established against Mr. Clough in point of fact; which must depend on the statements of the witnesses, and on the credit which was due to their testimony. On this point the testimony of Nathaniel Frothingham, the juror, corroborated and supported by all the other witnesses both for the commonwealth and for the defendant, seemed to establish the fact beyond any dispute, that the printed paper, described in the indictment, was, during the trial, given by Mr. Clough to the juror, by whom it was received and carried into the jury room.

But if the paper was in itself not applicable to the case, and not calculated or designed to affect the minds of the juror, or to render him more favorable to one side, and less so to the

other, it would not amount to this offense. For it is charged that the act was done in disparagement of Moore and Sevey, and to render the juror more favorable to Samuel D. Green. This made it necessary for the jury to have a general idea of the case which was on trial at that time. So that, on reading the paper, which was delivered to the juror, they might see its connection with that case.

The record of the case of the commonwealth against Moore and Sevey had been read, from which, and from the other testimony, it appeared though the indictment in that case was for a supposed libel on the private moral character of Samuel D. Green, yet that he was identified with the Anti-Masonic party, and that the defendants were identified with the fraternity of Freemasons; that the witnesses were taken from those two parties, and that the merits of Masonry and Anti-Masonry entered largely into the consideration of the case.

It was the right and duty of the jury to read the printed paper, and to judge from its import, whether it was calculated to have the influence upon the jurors, which is alleged in the indictment. If it was the evident tendency of that paper to render Masonry contemptible, and its disciples and advocates obnoxious, it had a tendency, so far, to establish the accusation against Mr. Clough.

The writer speaks of illuminatism, and the mischiefs which it had perpetrated in France under the veil of Masonry. He insists that the Masonic institution is frivolous, that it has done no good to the world, although its branches reached throughout its wide extent; that "while it blazoned its follies to the world under pompous names and ceremonies, it buried its virtues in midnight darkness." Not that all Masons are corrupt, but that bad men get into the society, and mislead the simple. One cannot read the piece without acknowledging the ability of the writer; and though we may not be convinced by his argument, we shall not fail to be struck with his eloquence.

It is not charged in the indictment, nor is it material to inquire, whether the jurors were influenced by this paper or not.

The question to be settled is upon the mischievous tendency of the paper, and the corrupt intention of the defendant to do wrong, when he gave it to the juror. If he intended that the juror should read it, and that it should influence his judgment on the trial, it was an unlawful act. Even if the paper contained nothing but truth; was material and pertinent, and might have been read in evidence; still, for a stranger to deliver it to the juror clandestinely, without the knowledge of the parties and the permission of the Court, was an unwarrantable interference with the regular course of a judicial trial, and was the offense which is charged in the indictment. Nor will that offense be washed out and atoned for by a request from the party, that the paper should be returned to him, when he found that he had made a mistake, and that his imprudence was likely not only to fail of its object, but to involve himself in trouble. The offense was consummated by the act done, coupled with the unlawful intention.

But it is for the jury to decide not only on the act done, but on the intention of the defendant. If they believe that it was on his part an act of inadvertence, that he had forgotten at the moment, as he declared, at the time that Mr. Frothingham was a juror, and requested him immediately to return the paper, before he had read it, and before it had done any mischief, it would seem that he discovered his error in season, and repented of it, and therefore that the act was free from the intention to pervert the public justice, which constituted its criminality. It is not your duty to indulge in a severe construction of the acts of the defendant, if there is room for the exercise of a charitable judgment. You may take into consideration his advanced age, and his general good character, though at the same time you are not to forget what was urged by the attorney for the Government, and even admitted by the defendant's counsel, that he was an ardent friend and a warm partisan.

The verdict of the jury is not to depend on the question, whether mischief was done, but whether it was intended. You are to attend to the unlawful act, its violation of law and or-

der. If you believe that the defendant did it designedly, you must find him guilty; if you deem it accidental and free from a corrupt intent, it is your duty to acquit him.

### THE VERDICT OF ACQUITTAL.

At five minutes before ten, the *Jury* retired and at six minutes after ten, having been out eleven minutes, they came into court with a verdict of *Not Guilty*.<sup>1</sup>

<sup>1</sup> The following is extracted from Judge Thatcher's charge, in the case of Moore and Sevey, for a libel on S. D. Green, and is the opinion alluded to in the preceding charge.

Neither the common law nor any statute, said Judge Thatcher, excludes Freemasons from serving on a jury or from testifying in any cause. But it excludes any person from either, whose pecuniary interest is directly concerned.

At a period in which party spirit greatly prevails, and in a country where opinion is free; if a man is to be deemed incompetent as a witness or a juror, because he belongs to one political or religious denomination rather than to another, perhaps a very great majority of the community and some of its best citizens, would be excluded from assisting in the administration of public justice. The Calvinist and Unitarian would exclude each other, and both would join to exclude the Universalist. The Mason and the Antimason would exclude each other. It would be impossible to empanel a jury or to try a cause. The objection is not, therefore, to be considered in the nature of a peremptory challenge. It is unknown to our law as such. It comes under that denomination of objections which exclude a jurymen who does not for some cause stand free, or indifferent between the parties, *propter affectum*. 'He must stand indifferent as he stands unsworn.'

Whether a juror is indifferent is to be settled by the Court; and our statute says, that the juror may be put upon oath to ascertain this fact. But I should not be free, after examining the juror on his own oath, to permit witnesses to contradict him. The challenger must elect either to abide by the result of the examination of the juror on the *voir dire*, or to rest his challenge on the evidence of others.

If a man should admit on his *voir dire*, that he belonged to a secret society in which he had voluntarily sworn on his admission, to prefer the members of the society to strangers in all cases—and to support them in their cause whether right or wrong—this would go to his indifference. But if he should add, that he now did not consider that oath as binding on his conscience, that he felt it to be his duty, if sworn as a juror, to decide according to the law and the evidence, and without respect of the persons of the parties, I know of no law to exclude the juror.

For the oath so voluntarily taken is not binding on his conscience; in fact, it would be contrary to duty, and to good conscience for him to render a verdict under the influence of that oath, against the truth and justice of the case. It is a temptation to his conscience, I know; but if a Court should set aside the juror for that cause—it would be an admission on their part, that the oath was binding.

To show by evidence that the juror was a member of such a society, and that he had voluntarily taken such an oath, would not be sufficient, in my judgment, to exclude him; because I should be bound to say, that such an oath was contrary to conscience and duty, and that it was not binding on him, and that I was bound to believe that, upon his being so instructed, he would disregard the oath. But the case would be otherwise, if the juror had taken the oath in reference to the case which was to be tried. Because that would show, that in that case he was not indifferent. Many Masons have publicly renounced the Masonic engagement and society, from a conviction that the engagement was not binding upon them. I certainly could not reject a seceding Mason on account of having formerly taken such engagement. I am bound to believe, in the first instance, that every citizen will act according to right and duty. If he has committed an error, that he will correct it, when so properly advised.

But even a seceder may labor under a prejudice, and so not be indifferent in a case, where a Mason is one of the parties—and therefore such a seceder might not be a free juror.



## **THE TRIAL OF DR. VALORUS P. COOLIDGE FOR THE MURDER OF EDWARD MATHEWS, AUGUSTA, MAINE, 1848.**

### **THE NARRATIVE.**

Dr. Valorus Coolidge was a young physician in the town of Waterville, Me., of good reputation, and with a flourishing practice, but notwithstanding this, he was always in need of money, borrowing it wherever he could and at any rate of interest—at the trial more than a dozen witnesses testified that he was indebted to them for money lent in sums from \$50 to \$400, and that about the time of the death of Mathews he offered \$500 for the use of \$2,000 for six months. Dr. Coolidge knew that Edward Mathews (who was a trader) had gone to a neighboring town with a drove of cattle and that he would return with a lot of money, made repeated inquiries as to how much he would probably receive, and asked the barkeeper at the hotel where Mathews boarded to let him know when he returned. Mathews came back, but the doctor did not see him for several days. There were several private interviews between Mathews and Coolidge on Wednesday and Thursday, and in the afternoon of the latter day, Mathews received \$1,500 from the Taconic Bank, and after eight o'clock at night, remarking that it was time to go to Dr. Coolidge's office, was seen to go in that direction. The next morning he was found dead in the cellar under Dr. Coolidge's office. Two deep cuts were on his head, some black and blue spots about his throat, and his boots were clean, though the streets were muddy at the time.

At the Coroner's inquest, Coolidge was examined with other witnesses, and stated that Mathews had been at his office twice the day before, for the purpose of borrowing \$200, which he wanted to make up the sum of \$2,000 he had promised to raise. The last time it was a little after eight o'clock

at night when he received the money—of which one hundred dollars was in a note he had received of one Doe. He denied that he had written any note to Mathews the day before, or at any time.

There was a post-mortem examination of the body, conducted by Coolidge. When it was proposed to examine the stomach, it was taken out by Coolidge, and the contents emptied into a basin. They smelt strongly of brandy. A few minutes afterwards he remarked to a bystander that they had better be removed, as they might scent the room. They were accordingly taken out, and after remaining awhile behind an old hogshead, were locked up in an ice house: whence they were taken, on the following Monday, and delivered to Professor Loomis for examination. When Coolidge was asked, on Friday evening, if the contents of the stomach had not better be examined, he inquired if they had been preserved; and on being told that they had, he replied that they had lain so long, nothing could be ascertained from them.

These contents were carefully analyzed by Professor Loomis, and found to contain prussic acid by several tests. Several physicians, who were present at the post-mortem examination, also testified that the liver, lungs, spleen and brain indicated the action of prussic acid, and that they perceived its peculiar odor. The medical men further thought that the wounds in the head not having been attended with inflammation were probably given after death, with a view of preventing suspicion of the real cause.

Coolidge was now strongly suspected of the murder, and was taken into custody. It was then found, and it was proved in court, that, on the seventeenth of September, he had written to Boston for an ounce of hydrocyanic (prussic) acid, "as strong as it can be," which he received; and that, on the nineteenth of September, he also wrote to Hallowell for an ounce of the same acid, "as strong as it is made." This acid, when used in medicine, is commonly diluted to two per cent. The pure acid is seldom called for. Dr. Coolidge previously had in his office some of the diluted acid.

On Monday, after the murder, a boy found in the top of Coolidge's sleigh, a gold watch and chain, which were proved to be the same as those worn by Mathews the Thursday before. They were wrapped up in white paper, which was of the same description as some found in Coolidge's office. Coolidge endeavored to persuade two witnesses to conceal from the Coroner's inquest that he wished to borrow money of them—having himself stated to the jury that, so far from wishing to borrow money, he had lent Mathews \$200, and to one witness he proposed to give fifty dollars, and declared he was a ruined man, when he could not succeed. Many minor circumstances corroborated the inference from these strong facts, but the testimony of Thomas Flint removed every shadow of doubt of the prisoner's guilt.

Flint was a student in Dr. Coolidge's office, and he stated that about nine o'clock on Thursday night, when he was going to bed, at his boarding house, he met Dr. Coolidge, who requested the witness to go to his office with him. When there, he said, "I am going to reveal to you a secret which involves my life; that cursed little Edward Mathews came in here, and went to take a glass of brandy and fell down dead; he now lies in the other room. I thumped him on the head to make people believe he was murdered." After some consultation, they decided on carrying the body to the cellar, to remain there until it was discovered the next day. The next day he found in the office a note from Coolidge, requesting him to sweep the office carefully, which he did, and removed some signs of blood. About noon he saw the doctor charge Mathews with \$200 lent, and he handed him a sum of money, requesting him to keep it, saying the jury might ask to see his pocketbook, and he did not know but there was too much money in it. After the examination of the body, Dr. Coolidge told Flint, while in the office together, that there was \$1,000 under the carpet, beneath the iron safe, which he wished witness to take care of. In the evening the doctor seemed to be greatly agitated. He took the money he had given Flint, selected some of the bills, put them into his pocketbook, and

gave the witness others from the pocketbook. The money was put in one of a number of jugs in the office, and the doctor requested Flint to sleep with him that night. The next day he seemed unwilling to receive back the money, but afterwards went to the office, broke the jug and threw the notes into the stove. Flint stated that a letter produced to the Coroner's jury (from Coolidge to Mathews, requesting the latter to call at his office on Thursday night), he had withdrawn "from the bag" on Friday night and destroyed. The doctor told Flint there was a bottle at his office that had contained prussic acid which ought to be destroyed, and that the bottle which had come from Boston should be filled up, for some of it had been used. He also desired that the brandy bottle should be rinsed, and the water in the sink thrown out. He also requested him to take the watch from his sleigh, and throw it into the river. Flint admitted that when before the Grand Jury he did not state anything about the money, the watch, or washing out the stains from the floor.

In consequence of this variance in Flint's testimony, the counsel for the prisoner endeavored to invalidate it; the jury, however, after a deliberation of twenty-four hours, returned a verdict of guilty, and the prisoner was sentenced, according to Maine law, to be hanged, after the expiration of a year spent in hard labor.

### THE TRIAL.<sup>1</sup>

*In the Supreme Judicial Court of Maine, Augusta, March, 1848.*

HON. EZEKIEL WHITMAN,<sup>2</sup> *Chief Justice.*

HON. ETHER SHEPLEY,<sup>3</sup>  
HON. SAMUEL WELLS,<sup>4</sup> } *Associate Justices.*

*March 14.*

The trial of Doctor Valorus P. Coolidge, for the murder of

<sup>1</sup>*Bibliography.* \*"Trial of Dr. Valorus P. Coolidge for the Murder of Edward Mathews, at Waterville, Maine, as Reported for and Published in the Boston Daily Times."

<sup>2</sup>WHITMAN, EZEKIEL. Born 1776, East Bridgewater, Mass;

Edward Mathews, at Waterville, Me., on the thirtieth day of September, 1847, commenced to-day.

The indictment contained four counts: First. For the murder of Mathews by striking him on the head with a stick of wood.

Second, Third and Fourth. For committing the murder by administering prussic acid to Mathews in a glass of brandy—from the effects of which poison he died.

*S. H. Blake*,<sup>5</sup> Attorney General, and *Lot M. Morrill*,<sup>6</sup> for the State.

*George Evans*,<sup>7</sup> and *Edward Noyes*, for the Defense.

Graduated Brown University 1793, Admitted to Bar 1797, and removed to Maine. Began to practice in Portland 1807; Member of Congress 1809-1811, and 1816-1824; Member of Executive Council, Massachusetts, 1815; Member of the Convention to Frame the Maine Constitution. Chief Justice of Court of Common Pleas 1822-1841; Chief Justice of the Supreme Court 1841-1848.

<sup>3</sup>SHEPLEY, ETHER. Born Groton, Mass., 1789; Graduated Dartmouth 1811; Began Practice of Law at Saco 1814; Member Constitutional Convention 1819; United States District Attorney 1821; United States Senator 1833; Judge Supreme court 1836; Chief Justice 1848-1855; Commissioner to Revise Maine Laws 1856; Trustee Bowdoin College 1829-1872. His son, John R. Shepley, was a prominent lawyer of St. Louis.

<sup>4</sup>WELLS, SAMUEL. (1801-1868). Born Durham, N. H. Began practice of law in Waterville, Me. Removed to Hallowell 1835. Member of Maine House of Representatives 1836, 1837. Judge Maine Supreme Court. Resigned 1854. Elected Governor 1855. Defeated 1856 by Hannibal Hamlin, Republican candidate. Removed to Boston, where he died. A. M., Colby (then Waterville College) 1833, Bowdoin 1838.

<sup>5</sup>BLAKE, SAMUEL HARWOOD. (1807-1887.) Practiced law Bangor, Maine.

<sup>6</sup>MORRILL, LOT MYRICK. (1813-1883.) Born Belgrade, Me. Educated Waterville College. Admitted to bar 1837. Removed to Augusta, Me., 1841, and formed partnership with James W. Bradbury. Member Maine House of Representatives 1854 and Maine Senate 1856. President of Senate. Elected Governor of Maine 1857, 1858, 1859. Appointed United States Senator 1861 to fill unexpired term of Hannibal Hamlin, who had become vice-President of the United States. Re-elected to United States Senate 1863. Served until 1876. Secretary of the Treasury in President Grant's Cabinet 1876.

<sup>7</sup>EVANS, GEORGE. Member of Congress 1830; afterwards United States Senator; From 1818 to his death, a Leader of the Bar of his State.

The court met at the court house of the county, but finding it altogether too small to accommodate the large number of persons desirous of hearing the trial, immediately adjourned to the Rev. Dr. Tappan's church. The church is a very large one, capable of containing perhaps fifteen hundred persons, yet it was filled as soon as the doors were thrown open, the galleries principally with ladies.

The prisoner, when brought into court, appeared calm and collected. His face exhibited signs of health. He was dressed with scrupulous neatness, in a black frock coat, black pants and vest. His appearance was that of a young man about twenty-five years of age, evidently a man of the world, one who had been accustomed to the better classes of society. His face bore strong marks of intellectual activity, and one would at once imagine his habit to be thoughtfulness and deep study.

The following jurors were chosen: Francis F. Haynes, Joseph B. Allen, Hiram Averill, Brown Baker, Jonathan Clark, Daniel Cunningham, Oren Dowst, David Elliot, Isaac Farr, Harrison Gould, Wm. Green, and Harrison Ham.

The indictment was read to the prisoner, to which he pleaded *Not Guilty*.

*Mr. Morrill.* Gentlemen of the Jury: The offense with which the prisoner at the bar stands charged, is one of the most important known to the law. In approaching an examination and inquiring into it, your duties and responsibilities are corresponding to the magnitude of the crime charged. I need not press upon your attention the solemnity, dignity and importance of your office. You are selected to maintain the public laws by convicting the guilty or acquitting the innocent. The oath that has been administered to you contains an epitome of the duty required of you,—at once the guardians of the public peace, and of the rights of the prisoner. You are to try the issue presented to you unaffected by any motives but those which should influence conscientious and rational minds. You are to examine the question of the innocence or guilt of the prisoner, without fear, favor, affec-

tion or hope of reward, on one hand, and without the prejudices arising from hated envy or malice on the other.

The crime of which the prisoner is indicted is murder of the first degree.

You are to inquire and by your verdict ascertain whether the prisoner murdered the deceased, and if so, whether he committed the act in accordance with a settled purpose or design to do it. If you shall so find, he is then guilty of murder with malice aforethought, which is murder in the first degree. The principles of evidence applicable to this prosecution are equally plain.

In entering upon the introduction of evidence on the part of the Government, it is admitted to be a settled principle of law that in proportion to the magnitude of the crime charged, is to be the care and caution of the jury, with respect to the nature and amount of testimony necessary to procure conviction. But while you regard this as a pertinent rule of evidence, you must remember that your oaths require you to listen and decide impartially, uninfluenced by sympathy or prejudice. The burden of proof is on the Government. Before you can be called upon to convict, all reasonable doubts of the guilt of the prisoner must be removed from your minds. The presumption of law is, that you have formed no opinion as to the guilt or innocence of the prisoner, who is entitled to the presumption of innocence until found guilty. But while you will faithfully regard these cardinal maxims of the law, you will also bear in mind that it is a perversion of these maxims, if from compassion, sympathy, weakness or other improper influences you allow the prisoner to escape because he may possibly be innocent, when by the law and the proof, the probabilities of his guilt are certain.

You are to expect and demand satisfactory proof, and what in law is considered full proof, is that measure of evidence which satisfies the mind of the jury of the truth of the matter charged, to the exclusion of all fair and reasonable doubts. You are not to expect absolute mathematical or physical cer-



tainty. This in all judicial investigations is utterly unattainable, and is not required.

When the proof is full and clear, for the jury to acquit upon light, trivial and fanciful suppositions and remote conjectures, is a virtual violation of their oath of office, and is no trifling offense against the best interests of society, to the hindrance of public justice and to the encouragement of offenders.

In this, as in all like prosecutions, a portion of the testimony will be that denominated in law circumstantial, that is, although the Government may not be able to produce and put upon the stand a witness who saw the prisoner administer the fatal potion, we shall prove other distinct facts, and which facts shall be so connected with the fatal fact that by their own natural force, they will irresistibly produce conviction upon your minds that the individual connected with these latter facts must have been the guilty agent.

The secrecy with which crimes of a flagrant character are generally committed, is such as renders detection and proof of the overt act quite impossible; and yet there is such an intimate coincidence in events, that no event of moment can possibly happen without evolving circumstances of such conclusive tendency as to force conviction and to exclude all reasonable doubts. The vestiges which the commission of crime always afford, form a chain of circumstances which lead unerringly to the offender, and by which he may be traced and ascertained.

With this statement of general principles, I will proceed to detail to you the evidence, which I doubt not will satisfy you of the guilt of the prisoner, and under circumstances exhibiting a cool depravity unparalleled in the history of crimes.

The first inquiry most naturally suggested is, was the deceased in fact murdered? This is denominated in law, "the body of the offense," and is often a point of great nicety and difficulty. Such were the circumstances under which the body of the deceased was found, and such the marks of vio-

lence upon it, that you will have no difficulty in concluding that the crime of murder had been committed.

The deceased left the Parker House at about eight o'clock p. m. in health, and in the morning was found dead in a cellar, the body resting on a pile of wood, the head bearing marks of repeated violent blows, and the pockets rifled of money and a watch he was known to have had on the evening previous.

The indictment charges the murder to have been committed by administering to the deceased a certain deadly poison,—also that he was murdered by the infliction of blows upon the head by a stick of wood. These charges must be proved in substance as alleged, and it is in compliance with this principle of law, if in the charge of murder by a certain kind of poison, the proof is of death by a certain other poison, or by a compound of poisons; or if death by blows with a stick or club of wood, or if the proof be death by blows inflicted with a broad sword or a hatchet, the only inquiry then will be whether the deceased fell by the hand of violence by blows inflicted on the head, or by secret poison, or both.

Was the death caused by poison? We shall show to you, gentlemen, that a large quantity of the most deadly poison, of the kind charged in the indictment, hydrocyanic or prussic acid, was found in the stomach of the deceased—a quantity sufficiently large to have produced death—that the presence of such poison was found in the brain of the deceased, as well as in other parts of the system, as would be natural to expect from the subtle and diffusive nature of the poison if death had been produced by taking it into the stomach in any considerable quantity—that at the post-mortem examination, effects of poison, and of the peculiar character charged to have been employed, were apparent in various parts of the system, as indicated by the morbid appearance of the coatings of the stomach, the discoloration of the blood, and other indications peculiar to death by this kind of poison.

From these facts and the peculiarly deadly nature of the poison it is probable that death resulted almost instantaneously with the introduction into its stomach. So destructive

is this poison to animal life, that the smallest quantities prove almost instantaneously fatal.

Was death in any way caused by blows upon the head? We shall show you that there were deep gashes upon the head, the scalp lacerated and the skull fractured, as if blows had been inflicted with the edge of a stick of wood. The blows were in reality probably inflicted by the edge of an unground hatchet, and were supposed to have been sufficiently violent to produce death, but probably not sudden death. These wounds, however, gave indications of having been inflicted after death. There were also marks of violence upon the throat, as if it had been clutched severely by a man's hand. From these facts it may be assumed that death was produced by the poison, and that the wounds upon the head were inflicted after death, probably to avert suspicion from deceased having died of poison, and to raise a suspicion that he fell by the hand of violence in the street. The facts, however, may be inconsistent with the hypothesis that the poison was relied upon as the principal agency. The blows may have been inflicted the more readily to despatch him, and the marks upon the throat the effect of clutches there to prevent any scratches in the struggles of death.

Having shown that the deceased was murdered, and the manner, the next important inquiry is: Did the prisoner commit the act?

When the act of murder has been proved, the motive which the accused may be supposed to have had to commit the deed, whether of intent or otherwise, is proper to be considered by the jury. The law supposes an intimate connection to exist between a man's motives and conduct; and, in judicial investigations it confides to the experience of the jury to infer the motives of the accused from his acts, also to infer what his conduct would be likely to be from the motives by which he was known to be influenced.

We shall show such acts and conduct on the part of the accused as to indicate a most pressing want of money, that he evinced great embarrassment in his monetary affairs; and shall

veyed from the office to the place where it was found; that in the back room, where his medicines were compounded, he kept brandy, of which deceased drank on the day of his death at three o'clock in the afternoon; that on the same shelf from which the bottle of brandy was taken, was an empty phial, which had contained prussic acid, and another which had a portion of the acid still remaining. Here was the phial which contained the prussic acid for medical purposes, as was also the unground hatchet.

We shall show you also, that this was a scene with which deceased had been made familiar by former invitations, and to which he had been specially invited that evening under injunctions of profound scenery. He would approach it with an incautiousness induced by former visits.

Thus artfully had all things been arrayed; nothing there which could excite suspicion, and yet the opportunity, in time, place, means, and other favorable circumstances, was complete. There sat the brandy bottle out of which the deceased had drunk in the afternoon, inviting him now as then; but the contents of that phial, then full, now empty, had been commingled with it. In the language of the prisoner, "he went to take a glass of brandy, and fell down dead." Thus fatal and sudden was the effects of this compound.

In connection with this we shall show that a few minutes before ten o'clock, probably after the fatal deed had been performed, the prisoner was seen on a back street in the rear of the building, probably calculating the difficulties of getting the body to the river. That about this time he was seen coming from the direction of his office and passing up the platform in front of the sitting room in Williams' tavern, turned, looked in, saw Flint (his student) with other members of the family, then retraced his steps without going in. That after this he came into the front entry, met Flint there on his way to his bed chamber, and requested him to go with him to the office. Flint did go and returned a little after ten o'clock, but the prisoner came in late. That he arose the next morning by four o'clock, and was seen coming from the

direction of the stable, where afterwards was found the watch which belonged to the deceased.

Having shown you the opportunity, I shall now show you that he sought the opportunity, and planned and arranged for it.

The deceased was known to the prisoner to be in Brighton with a drove of cattle. He is known to have made special and repeated inquiries, as to how much money deceased's drove would sell for—how much he paid for it—when he was expected back, and made arrangements with the barkeeper of the house where he boarded, and where the stages with the passengers from the West always stopped, to let him know when deceased arrived, for he was anxious to see him before he went to Clinton, where he had a partner. Deceased arrived on Saturday, but was not seen by the prisoner until the following Wednesday. He then met him in the street and invited him to his office. He went there secretly, and the prisoner was overheard to enjoin secrecy on him. Prior to this the deceased had put his money in the bank. We shall show that the prisoner proposed a negotiation with deceased by which it was arranged that the deceased should obtain for him from the bank \$1,500, on the security of his books. All of this being arranged, deceased, on Thursday, received a note from the prisoner to meet him at his office at eight o'clock in the evening, for the purpose of closing up the agreement.

Having detailed to you the proof that a murder has been committed, the manner in which it was done, and the prisoner's motives, objects, money and the opportunity of doing it, and his seeking the measures and opportunities, there is another species of proof to which I propose to turn your attention, and to which the law attaches the utmost importance, viz.: the conduct and declarations of the accused after the murder, and when it is known to him that he is suspected. The law scrutinizes the conduct of the accused so critically that it is made a presumptive proof of either guilt or innocence. And that conduct is an attempt to avoid suspicion by concealing evidence of his guilt—by fabricating false and

contradictory statements—by the destruction and removal of proofs tending to show who was the offender. These are such artifices as are commonly, according to experience and the maxims of law, resorted to by the guilty. We shall show you not only that the prisoner has attempted to conceal the evidence of his guilt—not only has he fabricated false and contradictory statements, but that he repeatedly attempted to suborn witnesses to testify for him.

Before the inquest, the day after the murder, he denied that he had attempted to negotiate money with any one, when he had in fact been in negotiations with Gilman & Gray. He denied that he had any arrangements with the deceased for money. We shall show that he had. He denied that he wanted an interview with the deceased on Wednesday. We shall show you that he sought an interview,—visited him in the street, and had such interview with him that night in his back office. We shall show you that when he knew that John Mathews had said he wanted money of deceased for speculative purposes with J. Potter, he went to George Gilman, of whom he had attempted to negotiate money, professedly for the same purpose, and by offers of large sums of money and other inducements, endeavored to persuade him to go before the inquest and state that he had not wanted money of him. That he attempted to induce Gray to do the same thing. That when before the inquest he stated that he let deceased have two \$100 bills on the night of the murder, and not being able to show where he got but one, he went to William Hill and tried to induce him to go before the Coroner's jury and swear that he let him have one of the bills. He denied that he had any agreement with the deceased for money, or wanted any of him, or that he had an appointment at his office with him on the evening of the murder, or that he had written him a letter. He carried on what he supposed to be a secret negotiation for money, and was to assign to him his books, which assignment deceased was known to make. He had in fact written a letter to deceased to meet him at his office that night.

When by the post mortem examination it was ascertained that poison was found in the stomach of the deceased, he caused the acid bottle to be destroyed, and the brandy bottle to be cleansed.

When Flint went into the back office and found the deceased lying upon the floor dead, he was told by the prisoner that he had fallen in an epileptic fit, while drinking a glass of brandy—that he had beaten him on the head to carry the idea that he had fallen by the hand of violence in the street, and that he must assist in getting him from the office, or they would be suspected of having murdered him—that after various proposals to carry the body to the river and the street, it was finally arranged to deposit it in the cellar, where it was found. That the prisoner went below to clear the way, came up, and carried the body to the place where it was found—that he afterwards returned and removed all traces, as he supposed, of the murder, and remarked that all was right—that Flint then went to the tavern, and not long after the prisoner followed. That on Friday afternoon, after the disclosure that deceased was to let him have money, he told Flint there was \$100 under the carpet under the safe, and which he desired him to remove. That after physicians had reported prussic acid in the stomach of the deceased, he told Flint the empty phial had better be broken, and requested him to replace the other on the shelf and fill it up with water, at the same time to throw the watch which had belonged to deceased into the river. We shall show that at the post-mortem examination the prisoner took the direction, removed the stomach, examined the wounds on the head and pronounced them fatal—that he poured the contents of the stomach into a bowl, remarking that they scented of brandy and had better be thrown away.

Thus unconfounded by the deed, with impious and bloody hands, like the guilty and murderous Macbeth, he

“Bends up each corporeal instrument to the terrible feat,”

and with unshrinking fratricide, baffles the searching suspi-



cion of the lookers on, and aims to put beyond the reach of proof the agencies he had employed in the execution of his baneful project.

#### EVIDENCE FOR THE PROSECUTION.

*David Shorey.* I keep a shop under the office formerly occupied by prisoner; saw the body of deceased on morning of Oct. 15th; lying on the wood with the feet out a little way of the door in the cellar; between 8 and 9 o'clock; a number of persons were present. The door was very heavy and made to swing inward; could go back no farther than it did, on account of wood piled behind it; it is a door made of two parts; the body was removed while I had gone to my shop; did not recognize the body, though I knew deceased; the hat was lying near by; noticed that deceased had on boots which appeared to have been newly blacked; looked as if a person might have walked in them a short distance; there was a black coat on the body; the brace on the pants was unbuttoned, and the vest and coat had the appearance of being pulled up.

The door which leads to this stairway was fastened on my side with an iron bolt, on the doctor's, I think, with a bolt and lock; the doctor kept medicine and fuel in the cellar, and the door was left unfastened to accommodate him passing and repassing. Don't know at what time my help left the shop on the night of the murder, but they came to my house a few moments after nine; three men and five females who compose my help came to my house at a

few minutes after nine, together with two boys. The boy who opened my shop in the morning was at his work taking off the blinds when I arrived.

*Cross-examined.* The partition between the two shops is lathed and plastered on both sides; a door leads into my press room, the control of which rests with one of my lads, and is fastened when the shop is closed; they usually stay in this back shop until 9 o'clock. Found the chairs in the morning as I had left them the night before; had been cutting a coat, and left about 7 o'clock; left the coat partly cut; found it in the morning precisely as I left it. Found the door of my back shop unhooked in the morning, as had been frequently the case for some time.

*March 15.*

*Joseph Hasty.* Saw the body of deceased on the morning after in the wood cellar; the body was in a sitting position on the wood, facing the door; a man in the street might have seen the body; noticed that his boots were clean; took the body out of the cellar alone, and then discovered that the body was that of Mathews. Saw him the day before at the Parker House, and on the evening of the same day in front of the Parker House, in a wagon. Noticed that he had his gold watch chain on at the time. I afterwards saw the

body in Williams' tavern; clothes on deceased were not muddy when I saw them; they were the same he usually wore.

*Cross-examined.* Mr. Tufts, Mr. Simpson, and about thirty others were at the cellar when I arrived there; do not know whether David Shorey had been there when I arrived; left the body with other persons and returned about an hour afterwards; there were one or two pairs of steps from Shorey's back shop to the cellar; Philip's store is a half store; very narrow. Saw no members of Mr. Williams' family in the tavern, but saw Dr. Chase, another gentleman and the driver; the froth on the mouth of the deceased was of a yellowish color; the streets were muddy on Thursday evening.

*David Bronson.* Saw the body of the deceased on my return from the Supreme Court. Was in a building in the rear of Williams' tavern at which I breakfasted; did not know the body at the time; there were present about a half dozen individuals; the body at the time was lying upon the wood, so near the door that the head was resting upon the edge of the door; a tarpaulin hat partly on the head so as to partly cover the eyes; from the right nostril a membrane projected about half an inch; the coat was raised up close under the arms, as if some one had been lifting it; Hasty asked me if the body could be removed before a coroner's inquest was held, and replied there was no objection, but that all the circumstances ought to be carefully remembered. Discovered no soil upon

the boots, or any indications of the body having been dragged there.

*Cross-examined.* There had been no attempt to remove the body before my arrival, it having been supposed improper by the persons present to disturb it.

*Cyrus Williams.* Saw the body of Edward Mathews on Friday morning in the doorway of the cellar, between 7 and 8; some half dozen persons were present when I arrived. It lay in a partly doubled up position, with one arm over the head; the dress was drawn up considerably; the clothes were clean. The body could not be readily seen in passing by it; did not enter the cellar; examined wounds on head; saw no watch on the body at the time, but do not know that the jackets were examined; was present at the coroner's inquest, and saw the stomach removed by Dr. Coolidge, put into a wash basin, and handed to Dr. Thayer; Dr. Thayer took the basin, smelt of it and said it had a strong smell of brandy. Dr. Coolidge said that I had better take it out, it might scent the room; took the contents, carried them down the back stairs and hid them behind an old hogshead. They remained there some time and then were put into the ice house, and kept there until called for by Prof. Loomis, perhaps 9 or 10 o'clock a. m. Dr. Plaisted was present when I delivered the contents of the stomach to Prof. Loomis; the contents were under lock and key in the ice house, and I had the key in my pocket.

*Cross-examined.* Mr. Soule came in the evening, asked me

if the contents were thrown away; told him they were not; he then asked me to put them in the ice house; told no person where I had put the contents of the stomach until they were locked up in the ice house; there was nothing in the ice house but saw dust; delivered the contents in the bowl to Prof. Loomis; my hostler had lost the key of the stable which fitted the lock of the ice house and could not find it; therefore could not open the ice house when I took the bowl from the room where the coroner's inquest was held. Do not know who called the physicians and held the *post-mortem* examination, think it was Simeon Kelley; accompanied the body when it was taken into my hall; the hogshead was an empty one lying on its side; the basin was not covered in any way when I left it behind the hogshead; it was a common earthen wash basin; think I took it from the hall; Dr. Coolidge had boarded with me about four years and kept horses at my stable; he had an extensive practice, to which he attended carefully; his general standing was good; has been my family physician since he boarded with me; it was known when I took the contents of the stomach out of the house; the place I deposited the contents of the stomach was not observable by passers-by, yet it was approachable; the wash-bowl was a glazed white one which had been used a year or two.

*Professor Loomis.* Received from Mr. Williams a bowl on Saturday noon, Oct. 2, at about 9 o'clock, a white wash bowl, containing a liquid; several persons were present at the time;

Dr. Plaisted and M. Shaw; took it from Mr. Williams at the head of the stairs; Dr. Plaisted suggested that it be put in a bottle; I and Dr. Plaisted went to his shop, put the contents into a bottle, and then to my laboratory; from thence to Dr. Boutelle's, taking the bottle with me; kept my eye on the bottle all the time, and allowed it out of my hands but in one or two instances; was directed to analyze the contents of the bottle, and applied chemical tests to it first for ascertaining if there was a presence of Prussic acid; a portion of the contents was found to exhibit indications of Prussic acid; the test was common coperas; a second portion was tested in a different manner and gave the same result, a presence of Prussic acid; made another test with the third portion, commencing with nitrate of silver (lemon caustic) which gave a curded precipitate; that indicated Prussic acid and several other substances.

On Monday there was an examination of the brain, a part of the liver, the lungs, a kidney and the spleen; the substances then examined had the same appearance as the portions of the body examined before; the spleen was very much softened. The brain was found to be very much softened; a knife was passed through it several times, and the interior found to be white. When the thorax was opened, detected a peculiar odor, which I have no doubt was Prussic acid. Have found that Prussic acid, when thrown into the stomach in considerable quantities, will produce death in from three seconds to fifteen minutes. An acid which I made,

of half the strength of the pure acid, put into the eye of a cat, produced death in ten seconds; the quantity was less than a drop. Am not able, from experiment, to say how soon death would be produced on a man. In one instance, a dog ran, after taking the acid, about 19 feet and fell dead; a shriek might be produced from the effects of the acid, but when ejected into the stomach, it would be the death shriek. The acid always produces on the stomach dark spots, and generally a discoloration of the liver and lungs; the blood in the veins is always rendered fluid; have not always discovered odor from bodies so poisoned, but have observed it about sixty hours after death so produced, when ejected into the stomach with brandy.

*Cross-examined.* Have had considerable experience in morbid anatomy; have never been a medical student, but have frequently seen dissections performed at the medical college in Philadelphia. Morbid anatomy is not a part of my profession, but anatomy and physiology are sciences I teach; have attended *post mortem* examinations, but am not aware of an instance where death was caused by poison or apoplexy; know of no instance, and know of no authors, who say that Prussic acid may be produced in the stomach by heat; knew very little about Prussic acid until called upon to make the experiments I have described; in none of the substances which I analyzed from the stomach of deceased did I discover brandy; the oil of vitrol could not be mistaken for hydrocyanic acid.

This was the first time I ever experimented on a human subject to ascertain whether death was produced by poison; have heard that a dose of brandy will kill a cat, but am not aware that it was ever a fact.

*Dr. Plaistead.* Saw the body of Edward Mathews on Friday about 9 o'clock, in Williams' yard and observed two cuts on the head; next saw it in the hall of Mr. Williams' house, and at this time observed another cut, also a fracture of the skull. Dr. Thayer, Dr. Coolidge and Mr. Flint were present. The scalp was not removed. The cut on the top of the head was perhaps half an inch long, and as deep as it could be before hitting the bone; the flesh was not swollen. Dr. Coolidge removed the stomach; it was filled with food partly decomposed. The wounds on the head were the result of three distinct blows; examined the body again on Sunday in the presence of Prof. Loomis, Dr. Thayer, Dr. Boutelle and Dr. Noyes; removed the scalp; found the brain very much congested, of a bluish color, and emitting a Prussic acid smell; the liver, the lungs and the spleen were more congested, and exhibited a more bluish tinge than I ever before saw at a *post mortem* examination. Saw Mr. Williams give the bowl containing the contents of the stomach into Mr. Loomis' hands; Prof. L. took it and went with me to my office, where we put it in a clean bottle and he proceeded with it to the college; I did not see it after; observed two or three small cuts on the thigh of the body inside the leg.

*Cross-examined.* Dr. Co-

ledge and Mr. Flint made the incisions on the body; observed a smell of brandy emitted from the stomach, but no other smell; have frequently seen the coatings of stomachs where persons have been addicted to drinking brandy, but this one exhibited a different appearance. The examination in the hall was by order of the coroner; am not able to say how much brandy was found in the stomach, but supposed at the time there was enough to have produced intoxication—say one glass. Never bought, sold, and never used Prussic acid, but there was a bottle, perhaps half full, in my shop which had been placed there by a student some years ago; am not conversant particularly with the smell of the acid.

*Dr. Noyes.* Saw the dead body of Edward Mathews on Sunday morning, 3rd of October, last; Dr. Thayer, Dr. Boutelle, Dr. Plaistead and Prof. Loomis were present.

On opening the body the lungs did not collapse; the right cavity of the heart was found empty; the blood flowed freely from the arteries that were opened; observed it was of a dark color; an odor the same as that proceeding from Prussic acid was distinctly noticed to be exhaled from the brain and the stomach; noticed that the spleen was highly gorged with blood; the tongue at the first examination was protruded from between the teeth, and the eyes were considerably dilated; noticed the marks of finger nails upon the left side of the throat.

*Cross-examined.* Have attended *post mortem* examinations where death was by apo-

plexy; they resembled this case in some particulars, more especially as regards the fluids; am not acquainted with morbid appearances where persons have died of intemperate habits; it is stated in the authorities that the brain sometimes or always exhales an odor as of Prussic acid. Physicians sometimes keep Prussic acids, druggists generally; it is an article of medicine and of different degrees of strength.

*Dr. Hubbard.* The ordinary tests of Prussic acid are to reduce it to the form of Prussiate of iron, second scienite of copper and scienite of silver. There are sensible properties of Prussic acid, its odor is one, and I think it about as reliable as would be the testimony of any three human witnesses on a certain point. Where death produced by this acid in large quantities, should expect to detect the odor, on opening the body, in almost any cavity—one grain would produce death in one or two minutes, a grain of concentrated acid, which would be equal to 50 grains of medicinal acid; I should not expect to detect the odor of the acid in the brain so soon as in some other parts of the system. There is no distinctive phenomena by which I should judge the death to have been caused by this acid, sooner than by the general bluish cast of the internal organs. Its operation on animals is very quick, producing immediate death; the odor of the acid can be discovered 64 hours at least after death; the medical faculty do not use it generally; am not aware whether it deteriorates by age, but writers say it is very perishable; the medicinal acid

is that generally kept by the apothecaries, and is 2 per cent of the pure article; not usual to find it in other forms than in the diluted state; have heard a description of the wounds said to have been inflicted on the head of the deceased; think they were inflicted after death. If I were to discern the odor of Prussic acid, I should feel certain that such an acid was there; have never discovered the odor of Prussic acid from the brain of a person who died from other causes, but some authors say such is the case; have never known the acid formed by decomposition of substances of themselves, but such statements are made by some of the authorities; I know nothing of Prussic acid ever being generated in the stomach as a natural process; some thirty years ago this acid was used with great confidence in consumption and pulmonary complaints generally; I once witnessed a case where brandy and Prussic acid were administered together, and 14 hours after, and also 40 hours after, there was no smell of brandy in the stomach, but there was a strong smell of the acid.

*Cross-examined.* I know that Dr. Coolidge was in the habit of keeping a larger assortment of medicines on hand than almost any other physician of my acquaintance. Brandy has little or no effect on Prussic acid; should expect to find in the stomach of an habitual toper some changes, but the liver always exhibits marked appearances of the effects of intoxicating drinks; have known Dr. Coolidge three or four years; he had an extensive practice, and

as a citizen I never heard aught against him. He was esteemed humane, and I always thought him so.

*Dr. Noyes (recalled).* Saw the bottle which Professor Loomis had, at Dr. Boutelle's office; I took the bottle, removed the cork, and on smelling the contents detected an odor of Prussic acid.

*Cross-examined.* Was once a student in Dr. Coolidge's office; know that he was in the habit of keeping Prussic acid on hand, a larger quantity than is usual with physicians; Dr. Thomas was a student with Dr. Potter, at Waterville; Dr. Coolidge maintained a good character, and I know nothing against his character for humanity; have heard reports prejudicial to his character, since this tragedy.

*Dr. H. H. Hill.* I am not much acquainted with the effects of Prussic acid on the system; a small proportion of physicians in practice keep it, diluted to about 2 per cent of the pure article.

*Cross-examined.* Never attended the *post mortem* examination of a human subject killed with Prussic acid; should expect to find the lungs of a person who died of a kind of "rum fit" somewhat gorged with blood; I have examined good authorities, Guy, Christison, but find nothing which would lead me to suppose Prussic acid is generated of itself from vegetable matter; the odor of the volatile oil of bitter almonds is similar to that of Prussic acid, and the only thing which might, in my opinion, be mistaken for it by the smell.

*William Tobey.* Prisoner was in my debt at the time of his ar-



rest, to the amount of something over a hundred dollars; I hold two notes against him, one for over \$40, the other \$50, and have an account against him; in March last he wanted to borrow \$500 of me, which he said he would keep five years at 10 per cent; did not loan the money; he wrote me a letter desiring it; sometime after I let him have \$40 in his office, at which time he wanted more, say from \$400 to \$500, and said he would give me a note when I gave him more; he enjoined from the first commencement secrecy about the matter; asking that I would let no one know it; saw the prisoner on Saturday following the murder in his office; asked for the money; he said it was impossible for him to pay it, that he was in trouble, and wanted me to rest easy until he got over his difficulties; that he had \$10,000 or \$15,000 on his books, and that I was perfectly safe; I wanted security but he said he could not give it, as he had agreed to give securities to Mathews, and was liable to be called on at any moment; made several attempts during that forenoon to get into the office of Coolidge, but found the door locked.

*Cross examined.* There was nothing said about Mathews in connection with the securities spoken of; called to get my pay in consequence of the suspicions which attached to Dr. Coolidge, and found him much excited; have been very familiar with him; prior to the accusation knew no harm of him; he practiced in my family and in my neighborhood.

*David Smilie.* The prisoner

is indebted to me by note something short of \$200 for money borrowed in June last, I think. His character was good, so far as I knew.

*Isaac Britton.* Prisoner is indebted to me by note for borrowed money; something like \$200; once met prisoner and asked him if he knew the note would be due shortly; he said he did, and asked me if I wanted it; I told him when the interest was promptly paid I sometimes let notes lay over. He paid me the interest on the day the note was due, and I never have spoken to him since about it; his general character is good so far as I am aware.

*David Moore.* Prisoner is indebted to me by two notes which are in the hands of Dr. Noyes, awaiting dividends; one of the notes was for, \$25 the other for \$100; prisoner did not want it known he was receiving money.

*Warren K. Doe.* Prisoner is indebted to me by note \$100; the note is dated September 25, 1847, and is "on demand." Since this affair happened, \$8 has been endorsed on the note; the indebtedness is for borrowed money which was loaned him at Waterville; his character is good.

*John R. Philbrick.* The prisoner owes me \$150, for which I have his note, given in 1845; the interest, 12 per cent, has been paid, but nothing on the principal; the character of prisoner is good.

*Jones A. Goodwin.* Prisoner was indebted to me on the twentieth of September in a small amount. Previous to that I had a note against him for something like \$180, given in the



winter, and payable on demand; the note was given to settle an account for clothing.

*Job Richards.* Prisoner owes me between \$400 and \$500, by notes; nothing has been paid on these notes with the exception of \$100, which was paid by letting me have a horse. There was no injunctions of secrecy concerning the loan or loans. Know nothing against his character; he has had an extensive practice in my neighborhood.

*Robert Drummond.* Prisoner owes me \$100 for which I have his note, given in June last; it was for borrowed money and made payable on demand; the prisoner practiced in our family, and I never heard any thing against his character.

*Augustine Perkins.* Am cashier of the Ticonic Bank at Waterville; on the thirtieth of September the prisoner had two notes, one for \$100 and one for \$150 in the bank, which had been over due six or eight months; they have been taken up since by prisoner's sureties. On the thirtieth of September Edward Mathews had a note discounted at the bank for \$1500. The blank on which the note is written was procured on Thursday at about 10 o'clock a. m., and in the afternoon I paid the money to Edward Mathews. Prisoner paid up the interest on his notes when called upon, and said he would take up the notes they held very soon.

*Charles R. Phillips.* Prisoner owes me about \$83, \$64 of which is by note, given in March, 1847, and running "on demand;" keep a furnishing store at Waterville; the prisoner applied to me for \$500 in July or August last,

for six months, but as he wished me to keep it a secret, I concluded not to let him have it. He offered me 10 per cent for the use of it at one time. He had hired considerable money of me two or three years ago, in sums from \$1 to \$100; the last I loaned him was \$100, in June, which has been paid since. Nothing was said about interest, but when he settled he threw down a small amount, which might have been the legal amount or not.

*James F. Gray.* Prisoner is not now indebted to me. In September of 1846 he borrowed about \$200 of me, payable on demand, and it was paid in January last by process of a suit which I commenced. He was to give me 12 per cent for the use of the money; he applied to me in August or September last, for enough to make out \$1000 with what he owed me then, at the same time saying he wanted about \$300 in all, to send to Dr. Potter, as he was going into a land speculation with him; he offered me \$500 for the use of \$1000 six months, and told me he would secure me with his books, by assignment or some other lien; he asked me to say nothing about the desired loan, as I think he said he did not want people to know he was engaged in speculations. This conversation was between two and three weeks before the death of Mathews, at the door of prisoner's office; met him again, when he asked me about the loan, and told him I was not sufficiently acquainted with business matters to do it. He did not wish the conversation known; he asked me again about the loan on

the day that the body of deceased was found; met him as he was coming from the coroner's inquest; went with him to his back office; he closed the door and locked it, and we were left alone. He put his hand on my shoulder, and as we walked to the window he started back and asked me if I thought those two men were watching us, pointing to two persons who were sitting on a log back of the office. I replied that I guessed not; he then asked me if I had been at the coroner's inquest; I told him I had not; he said he had and feared he would be suspected; I had lost the notes for the money he owed me, and asked him to renew them, having had his promise the day before that he would do it; he replied that he was excited and could not do it that day, but would the next, and asked me to say nothing about his application for money to send to Dr. Potter; I was about leaving the office when he desired me to stay, and asked me that if I should go before the jury what I should say I had been in the office for; I told him I didn't know; he desired me, in case I should go before the jury to say I was there for the purpose of having my lungs examined, but I replied that I was pretty healthy and people would not believe it; he mixed a bottle of medicine and gave it to me; I put it in my pocket and went out; I gave the bottle to Mr. Shaw, the owner.

*Cross-examined.* I am a boatman, sometimes hired and sometimes on my own hook; was in the village of Waterville on the night of the murder; left Mr. Sprague's, went to the store

house down by the landing at about 1 o'clock; I then went to Williams's and from there to my boarding house, and went to bed at about 2 o'clock; was asked by the coroner, when before the jury, where I was on the night of the murder; was in the back office with Dr. Coolidge half an hour or more; while there Coolidge told me he was suspected of the murder, said something about finding brandy in his stomach; I did not any time ask Coolidge what I should say before the jury, nor did I tell him that I was also suspected or anything of the sort; the warehouse I went to is about twenty rods from Williams's tavern; I rode down in a wagon; while at the storehouse I got brandy and drank it; had the key to the warehouse, and the brandy drank was from my bottle which I kept there; I was at Getchell's party until about 1 o'clock in company with some ladies, one of whom I have since married; at about half past 1, while going towards the warehouse, I saw Mr. James Hill just coming off of the Ticonic bridge; at the time I was in the office with Coolidge I did not know that I was suspected, and had no conversation with him respecting suspicion attached to myself.

*Charles Gilman.* Loaned the prisoner small sums of money about the first of June, 1846; he has applied at various times for small sums, which I did not loan; he owed me nothing at the time of Mathews' death.

*Eben Shaw.* Was called as coroner to summon a jury on the body of Mathews; during the examination noticed a discoloration on the throat of the de-

ceased, more visible on one side than the other; there was a cut across the thigh of the pantaloons below the pocket, which appeared to have been made with a knife; also noticed that the pocket had been fastened up with a breast pin, and afterwards forced open, as was shown by the pin still remaining. A man called Howe informed me that he had discovered some money in a wood pile, and I with a number of the jury went to the spot, and the money was taken out in our presence; the amount of money found was \$150; a watch was exhibited to me, but I do not recollect by whom, but my impression is Mr. Allen brought it in; a boy named Butterfield came in and testified that he found it; there was an appearance of blood upon the back of the watch and on the key when I first saw it; the crystal was also shattered; observed boots of deceased, and noticed that they were clean, giving indications of having been newly blacked; a hat was brought in which they said was found on the head of deceased, that had blood inside of it; while the prisoner was making examinations on the head, heard him say that he discovered a fracture in one part of the head, which in his opinion was sufficient to produce death.

*Joseph Nudd.* There are certain phials in my possession which were found in Coolidge's office in Waterville (he here exhibited two small glass bottles); they were found in a small closet between the shelves, where were usually kept his most costly medicines; the bottles have been in my custody ever since (three letters were shown which witness said were in hand writing of the

prisoner); noticed marks upon the throat of the deceased; I saw the body in the cellar where it was discovered, on the morning of the murder; saw the body removed; noticed a frothy substance which seemed to come from the nostrils and side of his mouth; prisoner had left some bills with me to collect some time before this, from June to August, or about that time; assisted in taking an inventory of prisoner's property after the murder, the nominal amount of which, in personal property, was not far from \$1600; this included medicines, &c., but not his books; paid a note which prisoner owed to Lorenzo Crowell, to Mr. Smith, which was over \$200; I paid this about the last of January, I think; (an account book was shown which witness said was prisoner's) there is a charge here which I know, reading thus: "Edward Mathews, dr., to cash lent, \$200." See no date to the charge; was requested by the coroner to go to the office and get this book; went there, told Coolidge my errand, and he opened the books and showed it to me; he asked me what they said about his book, and what he ought to say; replied that if it were my case I should state the truth; this charge was the last one on it; I was in the jury room when he stated that he had loaned Edward Mathews \$200, which were charged on his books, but that he took no note.

*Cross-examined.* Went to Coolidge's office at the request of the Attorney General, with him; he (the Attorney General) was there nearly all day looking over papers, &c.

*Miller M. Paine.* Recognize

the chain on a watch shown me to be the one worn by Edward Mathews, but could not recognize the watch. About 15th August, Mathews swapped another chain for this one; the watch which Mathews wore would compare with this one very well; have seen this chain a number of times.

*George Gilman.* Prisoner applied to me for a loan of money on the street, one day; he accosted me with "How are you, George? How are you off for money?" Told him I was poor; he said he wanted to make a raise of \$2000, as he was going into a speculation with Dr. Potter; that he had been in one speculation by which he had made \$3000 or \$4000, and was going into another; he said he would give me \$500 for the use of \$2000 three or four months; I then left him, and presently, while passing his office, he called me, and said I had better try and raise that for him, that it would be a good chance for me; he afterward called me and said he should want the money in the course of a month; he has asked me before to loan him small amounts of money; talked with prisoner on Saturday morning following the death of Mr. Mathews; told him that when I heard that he had applied to Edward Mathews for money, I told that he had applied to me; he said that he did not request money of me, but that he told me there might be money made at the West or South, and asked me if I couldn't fix it somehow so; I told him that I should state it as it was; he then exclaimed, "My God, I'm a ruined man; George, if I can only get rid of

your evidence I'm clear. I was going into no speculation with Dr. Potter, and I never wanted money of Mathews. I am doing \$20 worth of business a day, and have no use for money; my reputation will clear me." He said he must get rid of Potter, and also said, "My God, it is too bad for an innocent man," that he must get rid of my evidence if he could; that he would give anything to do it, and spoke of making me a present of fifty dollars. He wanted me to state before the inquest that the conversation he had with me was, that we might make good speculations West or South.

*Cross-examined.* Was 21 years of age May last; had dealt in horses to the amount of \$2000 or \$3000 a year; had a capital of \$500, perhaps \$700, most of which was borrowed; don't know where I could have raised \$2000 at the time Dr. Coolidge applied to me for money, but I think he desired such a loan, and hoped to get it of me; was very intimate with Dr. Coolidge; the doctor did not seem to be very much alarmed at the time I saw him, but was very anxious I should go before the coroner's jury and testify as he desired. Am now in the hide and leather business in New York, in company with Mr. Miles; I put in \$5000 capital; when in Waterville I collected rents for my father, who owns real estate there; when before the coroner's jury did not state the conversation behind the stairs, as I did not feel like it; my father let me have the \$5000 which I put into the firm.

*David Leighton.* Had a conversation with prisoner on Sat-

urday after the murder; I went into the office previous to this, where was also Mr. Richards; said to the doctor, "What an awful thing this murder is;" the doctor said, "Yes, I have lost mother, brothers and sisters, but never had anything to affect me like this;" asked the doctor then if he had heard anything new on the subject, and he said he had not; he then touched me on the shoulder and I went into the entry with him, when he said, "I suppose I have got to prove where I got a \$100 bill I let Edward Mathews have,

and have forgotten; will you allow me to say I got it of you, and not deny it?"

*Wm. W. Goodwin.* (A letter was shown witness.) Have seen it before. First saw it in September last, two or three days before the 21st. It was presented to Mr. Burnett; I am an apothecary; do business for Mr. Burnett at Boston. The order was executed by me in part, and afterwards found among the old papers and rubbish in the cellar.

The letter was read by *Mr. Morrill*, and is as follows:

*Waterville, September 17, 1847.*

Dear Sir—Shall I have the pleasure of making you acquainted with Mr. Phillips, a gentleman from this village.

You will give him an abdominal supporter, measuring twenty-seven inches above the hip bones. Give him that kind that you think will be best. The patient suffers much from a bearing down, and charge the same to me.

Also wish you to send by express the rest of those tubes.

1 oz. of Hydrocyanic acid as strong as it can be.

1 bottle of Cologne, opt.

1 lb. Zinc Muriate Iron.

Also any new preparation that will be worthy of trial.

Yours, respectfully,

V. P. Coolidge.

Joseph Burnett, Esq.

Sulphate Quinine, 2 oz.

Measure around the hips, 25 inches—around the small of the back, 25 inches.

Perhaps all this measurement will not be needed.

Joseph Burnett,

No. 33 Tremont Row,

Boston.

*Mr. Goodwin.* Mr. Burnett put up the shoulder braces; the hydrocyanic acid I put up myself (recognize the bottle, which was a dark colored one); the liquid is colorless, but was put in this bottle to protect it from

the light, which injures it. It is of the strongest kind; we imported four ounces of it; this is one ounce; this kind of acid is never sold for medicine, the ordinary medicinal acid is much weaker. The demand for this

kind of acid is very small; we imported it for the Eye and Ear Infirmary, where I suppose the vapor of it is used, but I do not know in what manner. The bottle is about two-thirds full, nearly or quite the quantity we sent. The handwriting on the bottle is my own; don't remember of ever selling this sort of acid before except in one instance, that was to a physician who wished to experiment on animals. We have only the manufacturer's mark to indicate that it is the strongest kind of acid. When I poured the acid from the large bottle into this one, the vapor was very perceptible and produced giddiness.

*Cross-examined.* I have frequently handled this kind of

acid, in its medical form; we put it up as often as once a week; it is used by the best physicians in Boston and elsewhere. All the medicinal acid is put up in ounce bottles and labeled, "minimum dose, one ounce;" that is the strength we always expect to find it. Don't know that we have ever sent any of the acid to the Eye and Ear Infirmary. *Fort* on the bottle means *fortissimus*, which is strong; it generally means, as applied to our business, "the strongest," or "as strong as it can be."

*Benjamin Wales.* This letter was received by me on the 18th of September last. I am in business at Hallowell.

Waterville, September 19, 1847.

Dear Sir:—Will you send me one ounce of the strong Hydrocyanic acid as strong as it is made?

If you have not the strongest, send as strong as you have.

Yours, etc.,

V. P. Coolidge.

Gave a bottle of the acid to the same man who gave me the order; bottles shown were not like the bottle I put the acid in; the degree of strength was not put upon the label, consequently I suppose it was the medicinal acid, which is 2 per cent strength; had it have been otherwise, I should expect to see it marked on the label.

I knew Dr. Coolidge, but had never before executed an order for him.

*Wm. N. Phillips.* Was at prisoner's office on Sunday, 13th of September; went to carry a measurement of my wife's person, to have him send to Boston for a supporter; he was writing

when I went in; went with him to the back office and took up a bottle which he said was a very powerful poison, Prussic acid; he said if he should put one drop of it on my tongue I should fall dead as quick as if struck by lightning. He said he had tried it on a cat; after finishing his letter, he read to me that portion referring to my own business. (The letter shown, I think, was the one I carried to Boston and delivered to Mr. Burnet.) Received the supporter, and ordered the other things to be sent by express. After my return, he was one day standing at my desk writing a direction for some cough



medicine, and asked me how the supporter suited; I told him very well; I then asked him if he had got his things, and he said, "Yes, all right." This was on the 29th.

Know that he had an extensive practice; his education was as good as that of young men generally, but I have heard hints thrown out relative to his conduct.

*Dr. Jonathan A. Smith.* Live in Vassalboro; had a small quantity of Prussic acid of prisoner in August last, which I received of him at his office; I could not tell how much acid there was in the bottle from which he poured; I supposed this to be the medicinal acid, as I recollect the odor, and it was prepared for a patient, so he told me.

*Augustine Perkins* (recalled). The bills shown me were of the same denomination, and the same bank as some I had let Edward Mathews have; they are on a Providence bank and are not generally circulated here.

*Franklin Dunbar.* I live in Windsor; the prisoner is indebted to me in the sum of \$100; on 30th of September last he owed me \$500, \$100 of which was borrowed in January, 1846, and a note given, on which nothing has been paid; he borrowed in the June following \$400; has since paid it; after the note was given, at the time the money was borrowed. Coolidge remarked that he would give me 10 per cent interest.

*Cross-examined.* Have known Coolidge a long time; his character was good, so far as I know, and his practice in my neighborhood very extensive.

*J. A. Goodwin,* (recalled). Prisoner called on me in April last for \$400 and said he was willing to pay 10 per cent; have loaned him small sums at several different times; when he applied to me I told him he could get the money very easily of Mr. Daniel Moore, he said he would rather get it of me, as he did not want people to know he hired money.

*Erastus Butterfield.* Am about 13; I found a watch on Monday, four days after Mr. Mathews' death, in Dr. Coolidge's sleigh top; several persons were present at the time; the sleigh was right over a little office in Williams' shed; climbed up over the carriages and got into the sleigh, when I found the watch right between the swell and the seat.

*Cross-examined.* There were cushions in the sleigh, when I found the watch; I was looking for nothing in particular, but was with some other boys looking around; beside the sleigh there was old stove pipes, and one thing and another in the shed; there was some person that went up into the shed before I did, but he did not stay long.

*Oliver Paine.* Was a member of the coroner's jury; saw the body of the deceased in the cellar the morning after the death; observed that the neck handkerchief was a little drawn up out of place; found in the pocket of deceased a small knife, a memorandum book, and some articles of perfumery; saw no money, pocket book, purse, or handkerchief, in the pockets of deceased; saw three rakes on one side of the throat which looked like the rakes of finger nails; they were about three



quarters of an inch wide and one inch and a quarter long; they had a reddish appearance, but did not bleed; should think the skin was raked off; there was a cut in the leg of the pantaloons below the pocket, and a bent pin in the side of the pantaloons pocket; also two or three slight cuts in the flesh of the thigh.

*Daniel Moors, Jr.* The prisoner was indebted to me in Sep-

tember last, by two notes, one for \$125, dated in October, 1845—the other for \$100, in November, 1845; both for money loan.

*Addison Smith.* This is prisoner's signature on papers shown me; they are statements which were made before the coroner's jury by Mr. Coolidge.

The paper was read by witness and is in substance as follows:

I saw Edward Mathews yesterday afternoon, about two o'clock, near Charles Mathews' store; he asked me if I was going into my office; I told him I was; soon after he came into my office; he wanted to hire some money of me; two hundred dollars; said he was going to let two gentlemen have it who were speculating in lands at the West; he did not name the gentlemen, nor where they were from; I said to him, I have not the money to spare; I had rather you would get it somewhere else; but I said if you cannot, I will let you have it; I did not let him have it at that time; he said if he could not get it anywhere else he would call again at 8 o'clock, and wished me to be at the office; he took a glass of brandy which set in a row with other medicines and went out; this was about 3 o'clock in the afternoon; he was in my office from five to ten minutes; I do not know which way he went from my office; I next saw him a few moments after 8 o'clock in the evening; I did not see him between the times above mentioned; when I saw him in the evening, it was at my office; he then came in and said—"Doctor, I must have that money, and I will pay you in the morning;" I let him have a one hundred dollar bill that I had of W. R. Doe, of Seabasticook; I do not recollect on what bank the bill was—and one hundred dollars in other bills, making two hundred; he then took his money out of his pocket, and counted it; he had two thousand dollars, including the two hundred he had of me; he then put the money into his pantaloons pocket wrapped up in a paper; Mathews said I have now got the complement for them and am ready, and immediately stepped out of the office; I soon followed him, and when I passed out of the office I saw Mathews in company with two gentlemen with cloaks on, before David Shorey's shop door; as soon as they saw or heard me, they moved off down street, towards Stevens' store; I saw two men that I supposed to be the same above named, near Goodwin's store the same evening before I saw them in company with Mathews; they were strangers to me; I had never seen them before; I was not so near as to distinguish their faces or describe them; I was in Dow's Tavern in the evening about 7 o'clock. I stepped in to see the register; I saw Charles Mathews in the door; I think I did not have any conversation with him at that time; I might have said "good evening;" the day before, that is the day before yesterday in the after-

noon, I had a conversation with Edward Mathews about signing a note at the bank with him; it was at my office; he came in and said, I have got some money to raise—and said, will you sign a note with John Mathews for \$1500 to the bank; I said, No, at once; it was four or five o'clock in the afternoon; no one was present; deceased wished to keep the business a profound secret; wished me to tell no one for my life—meaning both the purpose he wished the money for, and the fact that he had applied to me to sign the note; I never received any letter from Dr. Potter informing me that I could make a great speculation, and never communicated any such fact to deceased; I think I received one letter from Dr. Potter within two months; not quite two, certainly not more than one; have not within one week past received any letter from a person in Cincinnati; in the letter I had from Dr. Potter he spoke of speculation—and said if he had \$500 he could make \$4000 in six years; I once swapped notes with deceased; he had my note for a safe I bought of him, and I gave him for it a note against Hodgdon; in a few minutes after I left the office as I have before said; I returned to it once afterwards, in the course of the evening, say at about nine or half past nine, I again left the office and went into Williams' hotel to call Mr. Flint; I wanted him to look up some cases in the books; he returned to the office with me; Mr. Flint stayed there about one hour, and went away about ten or eleven; I soon after left the office and went to bed at Williams'; this morning at four o'clock I went to Mr. Bassett's in Winslow; I returned, and at six o'clock I started to Skowhegan; I had no call last evening to visit my patients abroad; I did not write any note to deceased last evening or at any time; deceased did not solicit me to become interested with him in any speculation; when deceased was in my office Wednesday afternoon, he appeared to have drank too much; I did not notice he was under the influence of liquor—at any time yesterday; I received a letter day before yesterday from my brother in Greenwood, Mississippi; I have had a consultation with George Gilman about a speculation, but did not solicit him to join me in it. It was in relation to land west and south; I do not recollect that I asked him to lend me money; I have looked for letters from Dr. Potter since I testified as above in relation to letters from him, and find none later than April; I have received letters from him since that time, but cannot find them, nor can I tell how recently I have received them; I have my day book which I now exhibit; I made the charge of two hundred dollars to deceased this morning after I returned from Skowhegan.

V. P. Coolidge.

*Mr. Smith.* This narrative was made from answers to interrogatories put principally by Mr. Boutelle, and I believe is just the language he made use of, he sometimes adopting the language of the question, sometimes making use of language of

his own; all his testimony was taken down, for the reason that at that time he was suspected of the murder, or supposed to have more knowledge of the affair than some others; he knew that he was suspected and told that he could have any wit-

nesses called to testify where he was on that night; he left at a certain point of his examination and went to his office for some letters; on his return he brought his day book, and exhibited it, saying that he made the charge of \$200 against Mathews since he went out; but of this I will not be positive; the doctor's testimony was read to him by me, after he had related it, and he pronounced it correct.

*Elbridge L. Getchell.* Saw prisoner and Edward Mathews on Wednesday afternoon, Sept. 29, opposite the store of Mr. Phillips; I wanted to see Mr. Mathews and therefore hailed him; he came across, and while I was in conversation with him, Dr. Coolidge came up and told him he wished to speak to him; he left me and went in the direction of Dr. Coolidge's office, in which direction also the doctor had gone a few moments before.

*Benjamin Ayer.* Was at the office of Dr. Coolidge Wednesday afternoon, Sept. 29; saw Mr. Dingley and Mr. Flint; asked them where the doctor was; had been there but a short time when Edward Robinson opened the door and looked in; while I was in the front office Dr. Coolidge and Edward Mathews came out of the back office together, and Mathews entered into conversation with myself and the others present; the doctor went down the stairs, remarking that he was going to Winslow to see a sick child, but returned and called Mr. Mathews out of the door; they were together a minute or less, when Mathews opened the door, and I heard the doctor say to him,

"keep dark," "all right," or something to that amount.

*Cross-examined.* I think the expression was "keep dark." Mathews was in my store on Thursday afternoon, an hour or more; he was lively and social, but I could not say whether he had been drinking; saw him again just before dark, going up the street; had not seen him in my store often; think this was the first time he was ever in it; I observed that he had on a watch when in my store, and a gold chain. (Watch and chain found in the sleigh were exhibited, but witness could not identify them as belonging to the deceased.) When I saw deceased in the evening, he was passing Ticonic block, going up street.

*Julius A. Bartlett.* Saw Edward Mathews on Thursday at about half past 6 o'clock, at Mr. Chick's store, opposite Williams' tavern. We had some conversation together, walked leisurely along by the Parker House, down to Mr. Smith's store, the building a few doors below prisoner's office; we returned back on the same street, and when very near the Parker House, he crossed and spoke to some person; he then proceeded further along, went into Mr. Chick's store, and I into the barber shop. A man named Carter was with me; we both (Carter and I) had on cloaks at the time. Knew prisoner from having met him several times in company, but had no intimate acquaintance with him. Think he had never seen Carter before; he is a classmate of mine in college.

*Ripley P. Simpson.* Saw deceased at the Parker House on

the Thursday evening before his death, in company with some other young persons; noticed that he had his boots blacked at the Parker House that evening. A little before 9 he left the Parker House and went in the direction of prisoner's office; do not know precisely what time it was when he left the Parker House, but the 9 o'clock bell rang a few minutes after he left.

*Cross-examined.* It was rather a dark night; think the streets were quite muddy; there is a private avenue leading into Main street, but it is somewhat further than the regular street.

*A. F. Tilton.* Identify a watch shown me as the one thrown down from the shed back of Williams' tavern by the boy, Butterfield. It was enveloped in this paper when thrown down; after discovering what it was, I carried it up into the hall where the coroner's jury were in session. Mr. Shaw, the coroner, took the watch from my hands, when I carried it into the hall.

*Cross-examined.* The watch was thrown upon the ground from the height of ten or twelve feet and I picked it up; am enabled to recognize the watch from the blood on the back of it; the stains are not so deep now as they were when I first saw it; have known Dr. Coolidge more than three years; knew nothing against his general character prior to this transaction.

*George Lincoln.* Was in Mr. Shorey's shop in Waterville on the night of 30th September, and left soon after the 8 o'clock bell rung; some young men were with me in the shop until we

left, together; there were five girls in his employ who worked in a room above; the room I was in was on a level with Dr. Coolidge's office; during the evening heard persons ascending and descending the front stairs, who I supposed went into Dr. Coolidge's office.

*Herrick Barton.* On the night of the 30th of September, was in Mr. Shorey's front shop, until nearly 8 o'clock; closed the front shop before he left in the evening, and then went upstairs; did not go into the lower shop; locked the door, and hung the key up on a nail; the girls had left the upper shop prior to this.

*James Hill.* Saw prisoner on the night of the death of Mr. Mathews, on the street next to the river, which runs parallel with Main street, in the rear of the buildings occupied by the prisoner; he was going north, and I in an opposite direction.

*Joseph W. Freeman.* Saw Dr. Coolidge on Thursday night about 9 o'clock, on the platform of Williams' hotel; he came there, looked through the sitting room window, passed off the platform and went away.

*John Bowles.* Saw Dr. Coolidge on evening of Thursday, under Mr. Williams' hall; was there greasing the axletrees of a coach as he came up and passed me on the left, and went towards the door which leads to the barroom; as he passed I said, "Hullo, doctor;" he replied, "Hullo," and passed on; this was at about a quarter past 9 o'clock.

*Nelson Adams.* Saw Dr. Coolidge on Friday morning after the death of Mr. Mathews, at

Williams' barroom, at about 4 o'clock; he was coming from the direction of the stable, and from the shed where the watch was found; he called John Bowles and said he wanted his horse.

*George L. Robinson.* Saw the prisoner at about 11 o'clock in the evening; he came into the barroom and asked me to call him at 6 o'clock the next morning; next saw him at about half past 4 o'clock the next morning, as he came into the barroom and desired me to order a breakfast for him. The week before the death of Mr. Mathews the doctor asked me if I knew when Mr. Mathews would be home from Brighton; he also inquired if I knew how much money he took to buy cotton with; I told him I understood he took \$200 from the bank; he told me that when Mathews came home he wished me to let him know, as he wanted to see him on his return; on the Wednesday before his death saw Mathews in the street and went to the office to tell the doctor; at one time he said he had lent Mathews some money that he did not take a due bill for and felt uneasy about it; this was, he said, the reason that he wished to see him.

*Asa Fernald.* Was in Dr. Coolidge's office on Thursday forenoon, and saw Mr. Flint, Mr. Dingley and Getchell, the office boy; while I was there Mr. Mathews came in and remained a short time; I saw Mathews take nothing from the safe, or any other place in the office.

*Edward S. Getchell.* Am 13 or 14 years of age. Saw Edward Mathews in Dr. Coolidge's office on Thursday, but do not

know what he came there for. When I came to the office the next morning at about 8 o'clock did not build a fire, but noticed there was a fire in the stove; first saw Dr. Coolidge that morning drive up to Williams' and get out of his carriage; saw a spot on the carpet near the door which opens into the back office, and called the attention of Mr. Flint and Mr. Dingley to it; Mr. Flint stooped down and scratched it with his finger nails. The spot was as large as my two hands; saw a hatchet there, the one I was in the habit of using to spit up my wood with.

*Amasa J. Dingley.* Saw Mr. Mathews in prisoner's office on the afternoon of Wednesday prior to his death. He came in with Dr. Coolidge, and went with him into the back office, the doctor locking the door behind them. He (Mathews) stayed there a short time, then went out, the doctor soon following him; was then a student in Dr. Coolidge's office. I came to the office the next morning at about 9 o'clock and saw a spot on the carpet.

*Cross-examined.* Did not remain in the office usually in the evening, except on Tuesday evenings; do not know whether the office had been swept or not on the morning I saw the spot on the carpet.

*William Howe.* Saw Mr. Flint on the evening of the 30th of September last in the sitting room of the hotel, at about half past 9 o'clock, and was in his company twenty or thirty minutes, when he left and went into the front entry which leads towards the barroom; he had a lamp in his hand when he left

the room; I found on the 4th of October last in the wood shed a quantity of money tucked down by the side of a joist stud; the amount was \$155; it was in a position where it might have been seen without removing anything by any person looking that way.

*Cross-examined.* Flint and Emily Williams were playing backgammon in the sitting room when I went into it; Flint went out first, and in about five minutes Miss Emily followed.

*Charles K. Mathews.* Saw Edward Mathews at the Parker House a little past 8 o'clock on the evening of his death; we were together at a small party here. Said he supposed it was time for him to be going to Dr. Coolidge's office; he then left, and that was the last I saw of him. Saw him at the barber shop at about 6 o'clock, the last time prior to that; previous to this I had seen him at my store; he came to my store the first time in the forenoon, having a letter with him which was from Dr. Coolidge, as I know from the signature. Edward put it about his person somewhere, and I did not see it again; have seen Dr. Coolidge write prescriptions and know his handwriting. Paper shown me is a note given to the bank for money received; my name is upon it, and was signed there in the presence of my father and Edward Mathews; after I had signed the note, Edward took it and went out of the store, going in the direction of the bank; when he came back to my store in the afternoon, he had a pile of money in bank bills; did not examine the money, but there

appeared to be a large amount; he remained in my store a very short time then; before this, while in my store, he wrote an instrument on a blank which was a blank for a mortgage of personal property; it was filled out as would be any instrument for conveying personal property; looked over his shoulder as he read the instrument to me; he then put it about his person; and that was the last I saw of it. Edward was in my store at the time he wrote the instrument referred to, an hour or an hour and a half. He put the money he showed me in his pantaloons pocket; saw him pin up one of his pantaloons pockets while in the store.

*Cross-examined.* I saw Dr. Coolidge write a perscription once at my boarding house, and know it was his writing from the peculiar style of the letters; saw some letters which Dr. Boutelle said were in his hand, that he saw him write; have also seen other writing of his since then; since the instrument was written. Have a distinct recollection of seeing Edward Mathews put the money into his pocket, and pin a pocket. It was in the evening when I went to the Parker House. Looked at the pile of bills Edward had, but did not count it; he took a piece of paper in my presence, and wrapped up the bills, previous to putting them in his pocket. Am a cousin to the deceased.

*William Mathews.* Am editor of the Yankee Blade, Boston. Am brother to the deceased; am administrator on his estate and have custody of his papers; found among his pa-



pers a mortgage of an interest in the Yankee Blade, conveyed to Mr. Norris, one of the partners. He was in business with Philander Soule of Clinton, or about commencing business with him. He had been residing with his mother at Waterville previous to his death.

*Chas. K. Mathews* (recalled).

*Mr. Morrill.* What were the contents of that letter?

*Mr. Mathews.* The portion that I distinctly recollect was, "Come to the office this evening and arrange that business, but reveal it not for your life," the latter part underscored with a very heavy dash; I looked over Edward's shoulder as he was reading the letter, but the first part did not make impression enough on my mind to cause me to say whether I read correctly or not.

*Philander Soule.* Live in Clinton; was in partnership in trade with Edward Mathews, in a small drove of cattle, which he took to Brighton; about \$1800 was paid out for the drove; saw the deceased at my house on Wednesday night; on the Thursday morning following he left, previous to which, however, he took a book of forms and looked for some forms of assignments and saw him open the book at the place where were forms of assignments and mortgages; the book (the Business Man's Assistant) he took with him; next saw him stretched on a board in Mr. Williams' hall.

*John Mathews.*

*Mr. Evans.* Have you been in attendance here during the examination of the other witnesses? I have been for the last two days.

*Mr. Evans.* Then I move that he be not allowed to testify.

CHIEF JUSTICE WHITMAN. Mr. Mathews is a competent witness.

*Mr. Mathews.* Saw Edward Mathews on the afternoon before his death in Charles Mathews' book store, also the same day in the forenoon at the same place. This is a note on which my name appears as principal with Edward Mathews; saw Edward Mathews writing at a desk; he showed the writing to me; it was a mortgage deed; I signed this note in the presence of my son, at his book store. Once held a note against prisoner for \$100, for money borrowed, on which he agreed to give me 12 per cent interest, and so wrote the note, but I objected to that and the interest was stricken out. Saw prisoner on the day after the death of Edward in the street and walked with him to Williams' hall, when I asked him if Edward Mathews was in his office the night before. He said, "Yes, he was in my office twice." I asked him if he came there to loan him (the doctor) money. He said, "No; he came to borrow money, and I loaned him \$200, which I did not take a due bill for, but charged it on my books, as he said he should pay it the next morning."

*Thomas Flint.* On Thursday evening, the 30th of September, between 6 and 7, went to the office; Dr. Coolidge came in, and we talked about procuring a subject for dissection; Dr. Coolidge said he had made arrangements with Charles Stackpole to procure the subject, that he would probably be there at 8 in the evening, and if he did, said he wished me to leave. At about 8, the door of the office



being locked, some one came and knocked; the door was not opened, and shortly the doctor asked if I supposed that was Charles; shortly went out of the office to my boarding house (Mr. Williams') where I found a child who had a blistered head; examined the child and sat down to play backgammon with Miss Williams. About 9 o'clock took a lamp and was going to bed when in the entry met Dr. Coolidge, who said he wished me to go to the office with him. He blowed out the lamp; went with him; he unlocked the office and I went in first; there was a dim lamp on the stand. After he had locked the door he said, "I am going to reveal to you a secret which involves my life; that cursed little Ed Mathews came in here and went to take a glass of brandy and fell down dead; he now lies in the other room; I thumped him on the head to make people believe he was murdered." Dr. Coolidge asked me what we should do with him; replied that I did not know; he then said, "We must get him out of the office," and said he wished he was in the river; told him I did not think we could get him there, it was rather bright; a place back of the building was then spoken of, but finally I told him we could not safely carry the body farther than the cellar; that was as far as I would go. He said he feared it would be found; told him it would probably be by 7 o'clock the next morning; he took the lamp and went to the door of the back office; went into the back office with him and saw an old pair of drawers lying folded up, on which was an

impression made as if by a man's head; near the drawers was a spot on the floor which had the appearance of blood partly wiped up; then passed on to the back window, which was raised as high as it could be; front of this window was a temporary counter, and between this and the window saw the body; Dr. Coolidge took the lamp and went down into Shorey's shop and opened the door; after he returned he asked me if I did not think it best to put something around the head; told him I did not know but it was; he then took the body from behind the counter; noticed that the hat was pressed hard on the head; he said it was best to take off our boots, which we did; noticed that the arms were stiff; we carried the body in that position down stairs; when we had got part way down the body slipped and the coat was drawn up partly over his head, the arms were also drawn up; we carried the body down through Mr. Shorey's shop and left it on the wood pile near the outside cellar door; Dr. Coolidge then took the hat off and let it remain near the head; we returned to the office; Dr. Coolidge took the lamp, went below to see that all was as before, and returned; after he wiped up a spot from behind the counter and took the towel and the pair of drawers and put them in the stove; he then asked me what it was best to do; I told him to go on with his business and let the matter come out if it would; he said, "They can't suspect me, can they? and my popularity is too great;" he said he was going away to Skowhegan and told

me I must come to the office before breakfast and see how things were; that there was a cask in the closet which ought to be headed up; I then started to go home and asked him to go with me, but he said it was not best that both should go together; went home, and as I was going in, met George Robinson, who asked me where the doctor was; I told him he would be in by half past 10, and asked him what he wanted of him; he said there was a Mr. Morse who wanted to see him; he remarked that it was nearly half past 10 then; took a light and went to my room; shortly Mr. Baker, my room mate, came in; when the first bell rung in the morning I got up and went to the office, where I found a note requesting me to sweep both offices, that he had found a shirt button there; I destroyed the note and then swept the offices; saw the same spot of blood I had seen the evening before, also a spot in the mop board under the window; saw some aromatic substances on the floor; went to the head of the cask and saw some spots of blood on that, which I rubbed off; heard some one open the postoffice; replaced the cask and put a hoop which had been knocked off into the stove, when I noticed there was a fire; went to my breakfast, and on my return saw Edwin Getchell, the office boy, sweeping the carpet; he noticed the spot on the oil cloth carpet near the old case; told him he might sprinkle it and sweep it up; went out of the office; on my return Edwin called my attention to a spot on a piece of woolen carpet near the inside

door and bookcase; examined the spot and found it was blood; also saw on same a few hairs in the blood.

Between 11 and 12, saw Dr. Coolidge in his carriage near Dr. Thayer's office; Dr. Thayer was then talking with him; went back to the office; saw Dr. Coolidge charging Edward Mathews with \$200; he took the account book and went out of the office, saying he was going into Mr. Williams' hotel; remained a short time when I was summoned to attend a Coroner's jury at the hotel. Before I left, Dr. Coolidge came in and handed me a sum of money from his pocket book, and asked me to put it in my pocket, saying they might ask to see his pocket book and did not know but there was too much money in it; shortly after they were assembled in Mr. Williams' hall for a *post mortem* examination. Dr. Coolidge sent me for his instruments to perform the examination with; I brought the instruments and they were used in the examination; was sworn with Dr. Plasted, Dr. Thayer and Dr. Coolidge. Dr. Coolidge did the cutting and I assisted him when he desired it. After he had finished I sewed up the cuts which were made, and was then sent out of the hall.

Some time after Dr. Coolidge's return from Skowhegan, he gave me a letter to destroy, which I did; tearing it up and throwing the pieces in the street; after the *post mortem* I put the money which Dr. Coolidge had given me into a wood pile in Mr. Williams' woodshed; after they got through with the *post mortem* went into the office

and Dr. Coolidge came in; he said there was \$1000 under the carpet under the iron safe, and wanted me to take care of it; but he thought it would be safe in my trunk; after supper removed a part of it, which I put in my pocket, and with a quantity of money which he had given me in the afternoon, put in a crevice near the door. In the evening saw Dr. Coolidge, and he told me that he wanted a part of that money. Mr. Williams told me that I had better go to the office, that Dr. Coolidge was there taking on and I had better go and quiet him; found Dr. Coolidge very much agitated; he wished to see Dr. Thayer; went to Dr. Thayer's house and called him; he went with me to the office and talked with Dr. Coolidge a short time, when he appeared more calm; Dr. Thayer then left, and Dr. Coolidge went to the house in company with Mr. Baker; went to the house shortly after; Dr. Coolidge went to his room, asking me as he went to sleep with him; hesitated, but finally went to his room; he took the money he had given me, selected some of the bills, put them into his pocket book and gave me others from his own pocket book; we then went to bed and talked about taking care of the money, and concluded it would be safe in a jug kept in the office; don't think either of us slept much that night; in the morning I put the money in a jug in the office.

In the afternoon I returned; he transferred his property to me, the business being done by Mr. Baker and Mr. Chandler; he went to the office, broke the jug, and threw the money into the stove; next morning I and

Getchell examined a hatchet that was in the office, but found no decided marks on it; I brushed a cloth on the book case near the door and discovered a small spot of blood upon it; that night after I and Dr. Coolidge had gone to bed, he importuned me very strongly never to record what I had discovered; the conversation turned upon the evidence before the coroner's jury; on Saturday night the chief conversation was about a letter which was written to Edward Mathews and testified to before the coroner's jury; asked him if that letter was in existence and he said that it was not; that on Friday night he went down and took it from the bag and destroyed it; the next day Squire Noyes was called in as his adviser; on Monday he (Dr. Coolidge) told me there was a bottle at the office that had contained Prussic acid, and that it ought to be destroyed; I asked him what bottle it was, and he told me one that I had not seen; I replied if no one has seen it, "Why do you wish it destroyed?" He said William Phillips had seen it; told him that Squire Noyes thought the bottles had better be left on the shelves as they had been; at his urgent request that I should fill up the bottle that came from Burnett, I went to the office, filled up the bottle out of the one that came from Hallowell, threw the cork with other old corks away, and destroyed the Hallowell bottle; then put the bottle which came from Burnett on the shelf, but subsequently put it into my trunk, having heard it suggested that in his rage Dr. Coolidge might destroy himself; the doctor told me the

brandy bottle ought to be rinsed and the water in the sink thrown out; took the cork out of the brandy bottle, but did not rinse it; the water was subsequently thrown out; on Sunday night he told me that he wished I would take the watch from his sleigh in the loft and throw it into the river; this I declined to do, telling him I would follow no further, but that matters must come out as they would; on Monday of the week following, the doctor's books were transferred to Squire Noyes, for the benefit of the doctor's creditors, the papers transferring the property to me having been destroyed; often when he was with me he urged me not to divulge what I knew and on no occasion expressed fears that I might so divulge.

*Cross-examined.* Am in my 24th year; have resided at home most of the time or attended school at North Yarmouth, with the exception of the time I have been with Dr. Coolidge at Waterville; have spent five months in Philadelphia, attending medical lectures. Partly disclosed to my father, a week after the murder, the facts I have testified to today, in my room at Williams' Hotel; I afterwards disclosed some part of it to Mr. Baker, as we were coming down here; first gave an account of what I was doing on Thursday evening, before the Grand Jury; told them that I was in the office on that evening examining books in order to get a correct idea of an important case the doctor had at Skowhegan; don't recollect what was afterwards asked me particularly; was under oath; did not state there what I have stated today. A

second time when before the grand jury I signed a paper containing the testimony I had delivered, when before it the first time; did not state to the jury anything about the money, the watch, or about washing out the stains from the floor; don't recollect that I told this matter to any one before I told it to my father. Have never had a guarantee that I shall not be prosecuted in this case. Gen. Simmons and my father have told me that if I would testify in this case, all the leniency would be shown me which the circumstances would allow; know nothing of how Dr. Coolidge came to send to Boston for the acid, and first saw the bottle and opened it when it arrived by express from Boston; smelt of it to satisfy my curiosity; it was labelled Prussic acid. We went down with the body in the dark, having no light; Dr. Coolidge was ahead when we started; could not see the body after we laid it on the wood pile in the cellar; we had to stoop a little in going on to the wood pile; the hat of deceased was on his head when we went down the stairs, but was taken off by Dr. Coolidge and laid beside the head, as I know from having felt of it as it lay there; don't know that I ever gave any body a different account of the manner in which the body was carried down stairs; don't recollect that I ever told any person it was taken down in a sack; know nothing of the deceased ever drinking brandy in Dr. C.'s office; noticed on Thursday that about one-third of the brandy was gone; think it was empty on Friday morning; the bottle was replenished from time to

time out of a jug we kept under the counter; think I filled it on Wednesday myself; we had frequent use for brandy; on Thursday noon it was about one-third gone; do not know who used it; it was Getchell who called my attention to the spot of blood on the carpet; found a few hairs in it stuck together with dry blood; the spot was about the size of a man's hand; was before the Grand Jury twice; Mr. Moore gave me no assurance of security; Mr. Baker slept with me in the same bed Thursday night; got up first but do not recollect whether he was awake or not; had some conversation with Baker after we went to bed, but can't tell what we talked about; did not sleep at all that night, nor did I get up during the night; heard noises in the house quite often, but can't say they were unusual noises; heard the stage when it went as I supposed; went part way down Shorey's back stairs in the morning when I went to the office to see how things looked; never counted the money given me by Dr. Coolidge, and don't know the amount. When I exchanged money with Dr. Coolidge, he said he wanted me to take some foreign bills and give him River bills in exchange, as they would be less suspicious if he wanted to use them. Had never seen the bottles of acid that came from Hallowell. Was inquired of by several persons at the coroner's jury as to whether I knew anything about the death of Mathews, but did not inform them; think it was on Wednesday that the Doctor expressed the most fears that I should divulge.

*Emily Williams.* Saw Thos.

Flint at my father's house on Thursday evening at about eight o'clock, in the sitting room—there were several present, among them a gentleman and lady with a child, Between half and a quarter past nine Mr. Flint went out of the room, or just as he was at the entry Dr. C. came in and said, "See here, you;" they both then went out of doors; the Doctor spoke as if he was in a hurry when he addressed Mr. Flint.

*Prof. Champlaine.* Called upon Dr. Coolidge at one time to get him to give something for the college; said he could not give anything then, as he had a large amount of money to raise and send to Dr. Potter, with whom he had entered into a speculation—that if the speculation turned out prosperously he would give something handsome to the college; he also named as an additional reason for not subscribing to the fund at that time, the probability of going abroad soon; subsequently he desired I should say nothing about the speculation with Dr. Potter or of his intention to go abroad.

*Samuel Doolittle.* Saw Dr. Coolidge on Friday following the death of Mr. Mathews, and asked him if the contents of the stomach had not better be examined; he asked me if they had been preserved, and I told him they had; he replied that they had lain so long nothing could be ascertained by them.

*Joseph Freeman.* I saw Edward Mathews on Thursday evening at about 8 o'clock as I was going into the bar room of Williams' tavern; he was passing out of the barroom under the hall, in the direction of the Parker House.

*Mr. Noyes.* Gentlemen of the Jury: The Government having concluded their testimony, it now becomes my duty to open the case for the defendant. The prisoner at the bar, gentlemen, stands charged with one of the most heinous offenses known to the laws, and you are set apart from your fellow-men to adjudge impartially as to the guilt or the innocence of the accused. You are well aware, gentlemen, of the prejudices which have existed in this case, and you are here to adjudge of the accused by the evidence only, always according him innocence until proven guilty.

On the thirtieth of September it has been shown to you, that the deceased was about his business in the streets of Waterville; at eight o'clock he was at a social party at the Parker House; he left there, and in the morning his body was found in the cellar under Mr. Phillips' store.

Let us look further into the matter. The prisoner was at his office in the evening of Thursday; he was seen to go to his boarding house, look into the window, and was afterwards seen in the public streets. Now, gentlemen, I propose to discuss this matter without taking into consideration the testimony of Thomas Flint (I shall have something to say on this matter before I close), but to review the testimony of credible witnesses, and such as the law declares to be such.

The prisoner at the bar, gentlemen, is a man of common sagacity. He is charged with the most heinous offense, and the act is alleged to have been committed in a building in a public street, at an hour when the rooms all around that in which the murder is alleged to have been committed, were full of persons, in the pursuit of various employments. Do you believe a man in the possession of his senses, could commit an act of this nature, when he was liable to interruption every moment; for it is proven that there were several keys to the office, and these keys in the possession of various persons. If, indeed, you believe the death to have been produced by a secret and deadly poison, are you satisfied that it was not an accidental death and not a premeditated one. But let us review the evidence here.



*Mr. Noyes* then reviewed the tests which had been applied to what he said purported to be the contents of the stomach and endeavored to show that they were not certain tests, placing considerable stress upon the testimony of Dr. Hubbard, as well as that of Professor Loomis. He also referred to the uncertainty of the contents of the stomach not having been meddled with after taken from the hall and placed over night in the open air. Had not, inquired he, some chemical action taken place in the substance in the wash bowl, while standing there? He was certain changes had taken place, for when the matter was taken from the stomach, there was a presence of brandy enough, as shown by the evidence, to produce intoxication, and when the same matter was placed in the hands of Professor Loomis, no brandy was found. As to the odor which proceeded from the brain and throat of the deceased, he stated that it was a certain fact that the extracted oil of bitter almonds has an odor precisely like that of prussic acid. No odor was noticed when the body was opened in the morning, and there was an inconsistency in supposing that had there been prussic acid in the body at the time, an odor would not have been discovered by the learned physicians present. I would be willing to rest the case here, were it not that such a mass of circumstantial evidence of a vague character has been introduced, touching on so many various points that I feel bound to go over the whole ground, notwithstanding the Government had entirely failed to connect a chain of circumstances which could bear upon the prisoner. In all considerations at present, however, I do not propose to touch upon the testimony of Thomas Flint.

It sometimes happens that innocent persons, when suspected of crimes, will take undue means to clear themselves from suspicion. Gray, it has been shown, would not have testified against Coolidge, had he not been suspected himself, and it could not be supposed that when conversing with Gilman, he (Coolidge), under the excitement he was then laboring, could have been over particular in the language he made



use of. It was a circumstance of little moment and ought not to be seriously considered.

The next thing that the Government attempts to prove, is that the prisoner had the means. We grant it, but the means were such as every physician on the river ought to have in his possession. Ten drops of the medicinal acid would have produced death; then should the circumstance of having procured other acid be considered? He had poison enough always, and the fact of a physician, with a large practice, buying a bottle of hydrociane, it seems to me ought to go for nothing.

As to finding the deceased's watch in the prisoner's sleigh, how easy it would be for any person to put it there, in order to throw suspicion on the prisoner. It was utterly impossible that the body of deceased could have been taken down through Shorey's shop, more especially by the cutting board, without disturbing the cloth lying on the board. We shall show you, gentlemen, that this witness Flint, with the oath of God upon him, has sworn on more than one occasion that he knew nothing of this transaction. We shall show, too, gentlemen, that he has given a different account of the transportation of the body to the cellar. He has lied before the Grand Jury, or he has lied here. If he had been convicted of perjury the law of the land would exclude him from the stand here. He has not been so convicted, and is, therefore, allowed to testify, but the fact that he has lied under oath, goes to so affect his credibility that you have no right to convict on such testimony.

We shall offer you evidence that the prisoner was not in want of money when he is alleged to have committed this deed—that he had due him, at the time, over \$6,000—that he was in excellent credit, not pressed by anybody, and that his business, so far from being on the decline, was rapidly and permanently increasing. The prisoner never asked Gilman and Gray for such sums as they testified to, it was mere idle talk; there was nothing in these circumstances which could

convey the least suspicion of a motive for the commission of this grave offense.

We shall show that from youth up, the prisoner has maintained a most respectable standing in society; has been considered a humane, a moral and upright citizen—one on whom no suspicion of crime had ever before rested, and who could not be suspected in this case, but from a variety of unconnected circumstances, of little or no weight.

#### EVIDENCE FOR THE DEFENSE.

*Oliver Paine.* Was one of the coroner's jury; Thomas Flint was examined on Friday, and also on another occasion; the first examination lasted about half an hour; he stated at this time that he had no knowledge of the murder of Edward Mathews, or any circumstance connected with it; that he saw nothing about the office to raise suspicion that the murder was committed there; that he saw Mathews in the street once after his return from Brighton, but that he did not see him on Thursday evening; that he was in the office himself until 8 o'clock, and that he then went to Williams's tavern, played backgammon until half past 9; that he then took a light and was going to bed, when he met Doctor C., and went with him to the office, where he remained until about half past 10, looking up medical cases in the books in reference to a case the doctor had at Skowhegan; that the doctor was sitting at a table with him; also that no one else was in the office; called again before the jury on Saturday, and interrogated with regard to what he saw about the office; with regard to a letter also; he declared that he had seen nothing to throw suspicion

on the doctor, and that he knew of no circumstance which would lead to the detection of the murderer; all of his testimony was not taken down on either occasion, as Mr. Smith stated it was strictly negative, and not necessary to be recorded.

*Joseph Marston.* Was one of the coroner's jury and heard the examination of Thos. Flint; he was minutely examined as to his knowledge of the murder in any respect, and he replied that he knew nothing about it; one reply that he made was, that when he went to the office after having been called from Mr. Williams's, he found the office lighted as usual, and the door to the back office open; he said he saw nothing unusual on the floor; said he could give no information of any character which would lead to the detection of the murderer; said he was employed on that evening in hunting up cases in the books; and that the doctor was sitting with him at the table.

*Benjamin Ayer.* Resided in Waterville at the time of the death of Mathews, and frequently heard Flint say that he knew nothing about his death; these replies were frequently repeated, from Wednesday to the Thursday of the following week; he

said he had no knowledge whatever of the affair, and could give no information with regard to it; was frequently with him and the doctor at the hotel; I saw Flint on the morning that the body was found back of the building; some one suggested that the body might not be dead; Mr. Flint went to the deceased, took hold of the hands, said they were cold, and that the person was dead.

*Cross-examined.* I frequently interrogated Mr. Flint as to his knowledge of the murder, because suspicions had rested on the doctor, and I told Flint that I wanted the facts to come out.

*Samuel Brown.* I reside in Buckfield; knew prisoner when he was a student of medicine with his uncle; he remained until he came to Waterville, with the exception of a time while he was attending medical lectures at Hanover; his character was very good; he kept school once in our town.

*John Simmons.* Reside in Canton in this state; have known the father of the prisoner twenty-five years; prisoner was born in Canton and I knew him from his birth till he left for Luckfield in 1841; he lived with his father most of the time until he was twenty; he obtained his education at the town school, and of his uncle, who was a literary man; in his early years he worked on his father's farm and acquired and maintained an unblemished character.

*Isaac W. Wheeler.* Flint told me at this time that they put a sack over the body before taking it down stairs.

*Daniel Baker.* I had conversation with Mr. Flint at the time the coroner's jury was held, fre-

quently, and he invariably told me he had no suspicion as to the murder; on some morning after Sunday, called on Mr. Flint at Mr. Williams's, for the keys of Dr. C.'s office, he gave them to me, and at the same time asked me if I would pour out the contents of a pail which stood in the office; I went to the office with Mr. Chandler, unlocked the door, found the pail but did not pour out the contents; I went to Mr. Flint and asked him why he wished the contents thrown out, and he said because that a fortnight before he had experimented with prussic acid, and some of it might be in the pail; I think he (Flint) poured out the contents of the pail afterwards. Mr. Flint and I came from Waterville here together to go before the grand jury; when about four miles from this town he said, "I suppose I have got to testify against Dr. Coolidge," but did not say what he should testify; I asked him if he knew any thing personally of the crime alleged, and he said no.

*Cross-examined.* When Flint and I were riding together he said he had got to testify against the doctor, that the crime was enormous, and he thought it must come out; that perhaps the doctor would have to be hung, and that it was rather a hard case; he said, I recollect, that he knew nothing personally of the affair; I have no recollection of ever having said to Flint, that to testify what he knew would be disastrous, but did say to him that we were bound to tell all we knew. On Monday night I slept with Dr. Coolidge in his room, on Tuesday night also, on Wednesday night Dr. C., Mr.

Flint, myself and Mr. Ayer, were together in one room; on Thursday night I slept there with Dr. C. and Mr. Ayer; when people came to the door that the doctor did not wish to see, I tried to keep them out of the room, more particularly those that came on professional business; have no recollection of ever having said, "It would not do for the doctor to talk with people, as he might commit himself;" on Saturday I wrote a bill of sale conveying Dr. C.'s horse to Mr. Flint, at Mr. F.'s request; the parties were asked particularly if this was a *bona fide* sale, and they replied that it was; the bill of sale was burned on Thursday, in the presence of Mr. Flint, and I think in the presence of Dr. C., also; it was burned because it was deemed a lawful way of getting rid of the instrument; the property was then disposed of by assignment.

*Charles E. Stewart.* I reside in Gardiner, and saw deceased at Gardiner on the morning prior to his death; also saw him the evening before in a room smoking and playing cards—gambling; he had a considerable sum of money which I saw him exhibit once during the evening; have seen the deceased gamble on other occasions than the one mentioned.

*Cross-examined.* The watch shown, I identify as the one I sold deceased at Gardiner in August last for \$75. I took a note for the payment, all of which has been paid except \$5.

*Henry Smith.* Saw deceased at Gardiner the evening previous to the night of his death, at the Cobossee house; think he was intoxicated; was half past ten or

eleven o'clock when I first met him, and about two hours after when I left him; didn't see him exhibit to any one besides myself any large sums of money; when I first saw him it was at the door of the house; and he invited me to his room; John Shackford, who is now in Boston, was in the room also, together with my clerk, a man named McCardy; recognize the watch shown me.

*Mr. Evans* (showing a watch). Did that ever belong to you? I can't say that it legally ever did. What sort of an ownership did you ever have in it, or when? Well, sir, I own it now; I won it of Edward Mathews, in a bet. What did you bet against it? This piece of property that I hold in my hand. How many bets did you make? One. Who were the umpires? Edward Mathews and myself.

*Mr. Noyes.* Am attorney in the case; was present on Monday or Tuesday evening at the office of Dr. C. in company with Mr. Flint and Mr. Evans; Flint was asked if he was present in the office on the Thursday evening of the death, and he said he was, and pointed out the place where he sat, and where Dr. Coolidge sat; stated that on that evening the blinds and the curtains were open; we then went into the back office, and he pointed out where the acid bottles, as he said, sat on the morning after the death of deceased. There was something in the brandy bottle which looked like brandy, and which he said was brandy. He told us that the bottles were exactly as they had stood the day before. Said nothing about having removed any bottles, and

said, I think to one of us, that he found nothing extraordinary in the office in the morning after the death; am assignee of prisoner's effects for the benefit of such persons as become creditors to him within thirty days prior to the date of assignment. The assignment was made without my knowledge.

March 20.

*Mr. Erans* desired to read from medical books, some passages in relation to the effects of chemical action on prussic acid which he said would go to show that witnesses who had testified here, had not read all that was contained in those works relating to the matter.

The COURT decided that reading from books other than books of law was not admissible, on the ground that the authors of those works were not under oath when they were written.

*Mr. Erans* said he would not undertake to say that the prac-

tice in the courts of Massachusetts and New York was more correct than the practice here, but that in those courts such readings would be admitted.

CHIEF JUSTICE WHITMAN replied that he adhered to his decision, and intimated that *Mr. Evans* had made use of improper language. *Mr. Erans* disclaimed any intention of casting imputations on the Court, but argued the right to read from the authors he had mentioned. The COURT adhered to its original decision.

*Mr. Noyes* read the statements made before the coroner's jury, of Thomas Flint, A. J. Dingley and Geo. L. Robinson.

*Mr. Evans* stated that a large number of witnesses were present, who would testify to the good character the prisoner had uniformly borne, but the state agreeing that such was unquestionably the case, the defense gave notice that the cause should rest here.

March 21.

*Mr. Evans.* I am now about to perform, gentlemen of the jury, as best I may, the last duty which devolves on me in behalf of the unfortunate man at the bar, the last that I or any person will be permitted to say in his behalf, and would to God that duty devolved on other lips than mine. I feel deeply the awful responsibility which rests on me and you, and I have not failed to notice the impression made on your minds by the proceedings before this court.

You will enter upon the case, gentlemen, having in your minds what is the duty of the Government. You are not to weigh the preponderances of evidence, but to be convinced beyond all doubt of the guilt of the prisoner, before you can be called upon to pronounce that awful verdict which shall consign him to an ignominious death.

This case presents many extraordinary circumstances: That the deceased came to his death on the night of the thirtieth of September, there can be no doubt; that there was an attempt made by some persons or person to convey the idea that he was murdered there can be no reasonable doubt; but who ever heard of a murderer attempting to emblazon his guilty work upon the public mind? Whoever perpetrated that awful deed, attempted and used all the means in his power to fix suspicion on others. Do you believe, gentlemen, that the prisoner at the bar would have taken the course it is alleged he has taken, in order to fix suspicion on himself? Do you see any motive he could have had in the commission of the deed charged, and he a man of ample means, enjoying the confidence of the community, and always having sustained the most unblemished character. The whole transaction is shrouded in mystery, and this dark deed, for a dark deed has been committed, may only be brought to light when the earth as well as the sea shall give up its dead.

You cannot fail to have observed, gentlemen, the extraordinary manner in which the learned gentlemen who have managed the prosecution of this case for the Government have proceeded. You have noticed that witnesses testified only in answer to interrogatories, and you cannot have failed to see the course we were obliged to adopt to prevent this singular mode of procedure. After examining about sixty witnesses and laying particular stress on the most trivial circumstances, you have seen the only witness placed on the stand who testified to anything like circumstances worthy of note. He was kept back for the very reason, and no other, that they knew he was not a creditable witness, and that he was not to be believed. I therefore propose to argue this case, without taking into consideration all this extraordinary testimony.

Gentlemen have been placed on the stand to testify to the effects of prussic acid, undoubtedly one of the most deadly of all poisons, but we find them possessed of a very limited knowledge of the action of poison. They are not toxicologists, nor do they profess to be. The action and effect of poison is not

a part of their profession. Physicians are not chemists, so much as they ought to be, and chemists are not toxicologists. But admitting there was a large amount of poison in the matter analyzed by Professor Loomis, you do not know it was the matter taken from the stomach of Edward Mathews. Mr. Williams does not know that no person was looking at him when he took the contents of the stomach of deceased and placed them behind the barrel, whence he took them twenty hours afterwards, and for the first time put them under lock and key. There might have been a hundred eyes looking at him. You do not know that substances were not placed in that bowl during the night they were laying in the open air, but you do know that the acid bottles were taken from Dr. Coolidge's office on that very night, and are there not strong reasons for suspicion that the poison was then put in the bowl, in which were the substances analyzed by Professor Loomis? Are not these things probabilities—are they not very possible, and do they not weigh heavily in your minds?

It has been shown you that hydrocyanic acid is one of the most volatile of all substances, and that it was most likely to have been found on the opening of the body, but here all the witnesses testify that on opening the body of the deceased, they discovered no odor that would lead to the suspicion of the presence of any such poison. There is no proof that there was any poison in the body at all, and it is very questionable whether the matter analyzed by Professor Loomis was the contents of the stomach as they were taken from the body.

Now, with all respect to the scientific gentlemen who have conducted these analyzations, I say they were not experienced men in such matters—they confess they were not, and it is a maxim which we find in the books that no man is fit to make an experiment which is to be relied upon unless he has often experimented before. A very learned gentleman, not a chemist, as he avows, not a toxicologist, as he avows, with some knowledge from books, and less from experience, testifies that he believes the chemical test to be as certain as the testimony of those witnesses on the stand, but on questioning, he does



not know that there are not other substances which may not be acted on in precisely the same manner as prussic acid, and yet he thinks his experiments are as much to be relied upon as the testimony of three witnesses on the stand. It is as much to be relied upon as the testimony of three Dutchmen or three Mahometans, whom the courts do not understand. Why have we not had here one who could have testified from a knowledge of books, not from an ignorance of them—one, who is not only one of the most eminent chemists in New England, but in America? I had hoped we might have had him here; why he was not brought forward I am not able to say.

There is very great reason to believe that the deceased, indeed we know it, had been indulging in the use of brandy, on the day of his death, as well as some days before, and we find in his system just the morbid appearances that might be expected to be produced from such indulgence. I do not wish to speak harshly of the dead, my duty is to the living, and I mean to do it. And we are told these morbid appearances are not much to be relied upon—furthermore, they are not to be relied upon at all. The learned gentlemen who have conducted the experiment on the stomach of the deceased talk as if the sciences they profess had been reached. Why, the very appearances they testify to are of modern discovery. I know that it is common for scientific persons to speak as if they knew what they affirm beyond a doubt, there is a pride and desire to be considered more learned than others, but how different from him who had made more scientific discoveries than any other man of any age, who on his death bed said: "I do not know what I may seem to others, but to myself, a child who has been all his life picking up pebbles on the shore, while the great ocean of truth lies unexplored before me."

The day may come when the fallacy of the tests which have been sworn to here will be exposed. I trust that in my time and yours many discoveries will be made which will serve to throw light on those sciences now quite in their infancy.

If there be any truth in the evidence of the learned professor, the basis of the acid which is said to have been found in the stomach of the deceased, is contained in the very bread of which we partake, and is it not very probable that decomposition may produce the acid itself? Yet we have no proof there was any acid there, or if there was, the evidence as to its locality is most contradictory. One observed its odor in the brain, another did not notice it in the brain but in the throat; while more did not notice it at all. And yet if there was prussic acid in the system at all, what proof have you that it was placed there by the prisoner? None at all, not a particle.

A great deal of proof has been intended to show you that the prisoner took extraordinary means to procure large quantities of prussic acid. He did send to Boston for such an acid, it is true, but in the same letter ordering the acid he desires any other new medicine worthy of trial. It is simply a proof of his desire to keep up with the spirit of the age, and we find that he was supplied with liberal quantities of the very best of medicines of all kinds. If the prisoner exhibited a disposition to keep up with the times more than other physicians around him, I pray you it may not be set down as a circumstance against him. We grant he had the means of producing the death; he should have, and no physician should be without them. The prisoner was of too investigating a mind not to have about him everything that could assist in a thorough knowledge of his profession. He did not procure these poisons secretly, as he might have done, but wrote for them openly, signing his own name, and it appears to me that if he was plotting the awful deed charged, he would have endeavored to conceal rather than display circumstances which would go to prove his guilt. That is not the way crimes are committed.

The conduct of the accused, before and after the death, they refer to. The learned counsel told you that he should prove that the prisoner endeavored to conceal evidence of his guilt—How have they shown this? Who was it that suggested the removal of the scalp? Who the opening of the stomach? It

was he. We find no one of the physicians who says he suggested these investigations. It was the prisoner—no one else. We do not find that he was anxious to have the contents of the stomach destroyed. He told Mr. Williams they had better be removed from the room, because the smell was disagreeable; but if he was anxious they should be destroyed, why did he not follow Mr. Williams, or watch where he put the bowl, or if that polluted testimony to which I shall have to come by and by, is to have one feather's weight, why did he not tell his ready agent, Flint, to watch Mr. Williams, and to put some neutralizing substance in the bowl, or in the body when he sewed it up? He had the means in his hands and knew their use; and he had an agent by his side ready to do his bidding. Who believes that such precautions could not have been taken by a guilty person? When, some time after, it was mentioned to him that there might be poison in the contents of the stomach, he answered by inquiring if they were preserved, but he expressed no anxiety about it; and when it was suggested that they be taken to Brunswick to be analyzed by Professor Cleveland, he answered that if there had been poison there, it would escape before it could reach the professor—just such an answer as he or any other experienced physician should have made. Is this a circumstance which goes to prove guilt?

Is it to be believed that for the paltry sum of \$1,500 he should commit this heinous offense, and that is set down as the motive. We acknowledge that he had borrowed money, but he had ample credit, and could always procure it. He, like a great many other men, did not wish it known how much or to whom he was indebted. He did not care that all his business should be known. No one was pressing him for money, for Mr. Noyes testifies that he has collected out of the prisoner's debts, \$1,600 in a few days, and from the best men in the place. If he had wanted \$1,500 could he not have secured it in sixteen hours? Most certainly he could. And as another proof of the fallacy of the motive set up, the Government have themselves shown that he was to borrow, and could have bor-

rowed of the deceased the sum mentioned. Does this show that he was reduced to such an extremity as to require the commission of the heinous offense charged? We find that he had ample ability to pay all his debts, and how much more we do not know.

I think you can perceive in the testimony of Gray, Gilman and Leighton, a very particular circumstance. They all speak of transactions as happening at the time of the murder—as if the murder had already been proved. They ought to have more respect for themselves and the tribunal before which they testify. They spoke unadvisedly, indiscreetly, I hope unthinkingly. Now Gray appears here in quite a suspicious position. He had himself been wandering about that night, and I think contradicts himself in a small circumstance it is true, but he does say that he would not have testified against Dr. Coolidge had he himself not been suspected. The learned counsel has told you that as to Gilman, it was an idea perfectly ludicrous that Dr. Coolidge should have thought to borrow of him a large sum of money. He was a young man without means, and so known to the prisoner. When suspicions were hovering around the prisoner, and when laboring under intense excitement and anxiety, it may be that the prisoner wished Gilman to testify in the manner he says; I know it will be said that innocence holds up its head, is bold and firm: I know that martyrs have died for the truth; but I know also that Judas, a man before apparently as pious as any of the followers of the founder of our religion, denied his master when on the first occasion put to the test. An instance happened in a neighboring state of two brothers who were convicted of the murder of a man, and when circumstances gathered thick around them, confessed the deed, but before the execution took place, the man supposed to have been slain appeared, and proved by his presence the falsity of the confession. It was better that the truth should be told on all occasions and under all circumstances, but we find mankind weak, and we must judge of persons as they are, not as we might wish to find them. Alas for the weakness of our

race, we are not what we could wish to be. The Almighty has seen fit to constitute us as we are.

And I beg leave to call your attention to the circumstance that witnesses endeavor in some way or another to connect any circumstances with the transaction. If Mr. Mathews went down Main street, he went to the bank, as if he went there after money. If Doctor Coolidge was seen one evening at the boarding house, under the hall, he came from the direction of the shed where the watch was found. In the first case Mr. Mathews was going in reality as much in the direction of Bangor as in that of the bank, and Doctor Coolidge had been seen undoubtedly coming from under the same hall, a thousand times before. Great stress is placed on the circumstance of the watch being found in Doctor Coolidge's sleigh. Does this connect Doctor Coolidge with the transaction? No. It rather disconnects him with it. Would he have secreted the watch in his own sleigh when there were a thousand other and better places where he might have put it? When the watch was found, people were searching, and persons had been seen to go into the loft where the sleigh was stowed away, before it was found. Might not some one who was anxious to throw suspicion on him have placed the watch there before the boy found it?

There is nothing more unreasonable than to attempt to connect the doctor with this matter from the circumstance of his having got up early in the morning and gone on professional business. Every physician who has testified here on the stand, has done the same thing. Had he not been a physician, not in the habit of being called in the night, it would be another thing.

Why were these bottles brought here, why the clothes, why the carpet, all of which prove nothing? There was a hole in the pantaloons, it is true, under the pocket, I did not examine it minutely. I did not think it worth the while, but if I saw it rightly it was not a cut, as testified to, but a tear. And, after all, I can't see what those pantaloons were exhibited for. Can't you see how they were torn? The body was

drawn across the wood pile, and what is more reasonable than to suppose the pantaloons might have caught on a splinter and thus been torn? It is all plain enough, and there I pass it by.

How about the letter on which so much stress was placed? A witness testified that there was a letter written to Mathews desiring him to come to the prisoner's office and not mention it for his life; no date is given, no evening specified, and one witness testified that he had seen the letter on Tuesday and Wednesday in the office. Besides, the witness who testifies to the handwriting of the doctor knows it only from having seen a few lines of hieroglyphics written for an apothecary, and while the witness was sick in his bed. He had, however, seen something that was said to be written by the doctor, but in a disguised hand. It was a letter written once at a fair, and any person who is acquainted with this sort of amusement, knows that such letters are usually written in disguised hands.

Now, let us look at the circumstance of Mathews' having been seen to enter the back office with the doctor. Mathews was somewhat in the habit of drinking brandy, and what more natural that when intending to take a social glass, they should shut the door. There was motive enough.

I think my learned friend has read from that greatest of the world's dramatists. He quotes *Macbeth*. I think he has read *Macbeth* also for more purposes than his quotation, for it also said that on the night when the king was slain the elements were in commotion, noises were heard in the air, etc., and we have had good testimony that though there were no particular commotions of the elements, a dog did howl, most strangely, as he had never been heard to howl before. He must have read further of the works of the great dramatist, for it is there written, and I believe it is a historical fact, that when the argument was made before the dignified jury, who were considering the death of Cæsar, his robe was brought in and shown, and that the grave Senators were called upon to

"See what a hole the envious Casca made,  
Here ran the dagger," etc.

Is not this all stage effect, and display, calculated to impress on your minds, prejudice and bias?

Having now gone over the circumstances which have been introduced, do you not find them too flimsy and too unconnected to be seriously considered as proof of the guilt of this defendant?

I have very nearly concluded the observations which I deem important, gentlemen, upon the various circumstances connected with this case, but I might extend them very much. This is not, however, my purpose, for while relying upon your candor, your judgment and your experience, I have endeavored to go over the matter in the plainest and simplest language. I may not have touched on all the circumstances, for I have not looked at any notes, but knowing the industry of the gentlemen who are to follow me, I will again look at some of the prominent features of the case. By referring to the minutes of my brother, I see that I was wrong if I stated that Burns swore to nothing more than that an operation was performed on his finger in Coolidge's office. He said that he saw Mathews there, but how does that connect Coolidge with the commission of this horrible crime with which he is charged?

It will be contended that Mathews was murdered in that office by Dr. Coolidge on a certain evening. It will be contended that such has been proved. Now, let us see. Mathews was seen at nine o'clock; he was seen to go into Main street, and that was the last time he was seen alive. The young men who were in the room near Coolidge's office at ten minutes past nine o'clock heard no noises there, and it is probable they would have heard them had any noises been made. At a quarter past nine, Dr. Coolidge was seen by Bowles, the hostler, in the yard of Williams's tavern, and there appeared nothing unusual in his demeanor. According to their witness, Flint, at half past nine he went to the office and found the dead body, with the limbs rigid. In twenty minutes from the time the rooms around the office were occupied, the body is found cold in the back room. At eight o'clock the deceased was alive at the Parker House. He went out, it is true, but



returned. Up to ten minutes past nine we have a right to assume he was alive, and now at what time was this awful tragedy enacted? The whole thing is too impossible of itself, even if it stood on better and firmer ground. There is not a circumstance in the whole case which is not easily explainable, and circumstantial evidence, to be of value, must be so positive that it cannot be explained in any other manner than the one alleged.

Suppose a man is found wounded in a closed room by a bullet—and a person accused was seen on the day of the murder going secretly to that room with a loaded pistol, and such fact sworn to by one witness—another witness swears that he saw the accused purchasing powder and bullets—another that he saw him go to the room—another that he saw him coming from the room, and another that no other person could have gone to the room, with the circumstances added that the pistol was found in the pocket of the deceased, discharged. Here is a chain of circumstances—each part sworn to by different persons, but so enumerated that the whole can be traced from one end to the other. This, you will say, is good proof; as good, perhaps, as would be the testimony of one credible witness on the stand. But have we such a chain here? Up to Friday night, were you as well satisfied of the guilt of the accused, by the circumstances related, as you could have been had one credible witness testified to his guilt?

The humanity of the law is such that, formerly in England, a man charged of a capital offense, was not allowed counsel to speak for him. You will think this rather severe, but why was it? It was because juries were not allowed to convict until the case was made absolutely certain.

Mind you, gentlemen, I am speaking without reference to the evidence of Flint. Admitting that the murder was committed, might not some other person than the prisoner at the bar have committed the act? This is a matter worthy your most serious consideration, and I cannot too strongly impress it on your minds.

Gentlemen, if my strength permitted, I might pursue this

train of remark much further, but I do not know that I should make the case much clearer. You are not to convict, you can not, until every reasonable doubt is dispelled from your minds. You are not to say that if there be nine hundred and ninety-nine chances of guilt against one of innocence you will convict, but you cannot transcend mathematical calculation, you must be absolutely and positively certain.

In reference to the testimony of Flint. The law tells you, and rightly, that you must have unpolluted testimony, that of credible men, but I confess I was much surprised when with unblushing coolness Flint came upon the stand, and acknowledged himself guilty of some of the highest crimes which the law punishes severely. Had he been indicted, as he is liable to be indicted, or convicted, he would not have been allowed to be heard here. By his own confession he is an accessory to a murder, and by the same confession, is guilty of the crime of perjury. I allow it is competent to place him upon the stand, but the books tell us that unless such testimony be corroborated in material parts, it is not to be considered as in any degree valid. The law will not permit either life or property to be put in jeopardy on such testimony. Is there security for life, or property, or anything, if testimony coming from polluted lips is to be credited for a moment? What say the books? The moment a person is convicted of the crime of perjury he is not to be believed in any case or under any circumstances. I think you do not wish to rely on this testimony. You will say to the Government, we will not be the means of taking away the life of a man until you give us substantial evidence. You have a right to demand proof free from all suspicion, more especially such suspicion as this. A perjury has been committed by this witness, on his own confession. You have as full knowledge of it as if the copy of an indictment found against him were presented or read to you, and you know you are not to receive the testimony unless substantiated in material facts. This evidence is not substantiated at all by other testimony, but is contradicted in a most material matter. Either Flint or Hill lies, for while Flint

and the prisoner were enacting this most horrible tragedy in the prisoner's office, Hill saw Dr. Coolidge walking leisurely along the river.

*March 21.*

*Mr. Evans.* I hold it to be impossible that the body could have been taken from Dr. Coolidge's office, through the alleys to the cellar without having disturbed the cloth on the cutting table, or in some way altered the arrangement of the chairs or rubbish in those alleys. The body was never taken down that stairway, it could not have been from the very nature of the case; it was placed in the cellar through the outside door. It must have been, I hold, it could not have been otherwise. What could have induced Flint to endeavor to fix this crime on his late tutor I know not. I have not to inquire, nor will I suppose the hope of succeeding him in his business, could have weighed with him in the matter. I will not attribute to him so base a design. There is enough on his account of wickedness already. Could I believe the whole of this testimony, Flint's and all, I would stand here and ask you to acquit the prisoner on the ground of insanity, for I cannot believe that a sane man, on whom character had ever stood unblemished, as the counsel on the other side are willing to admit, and as we could prove by thousands of witnesses were it necessary, would in his sober senses, go about the commission of so awful a deed and scatter the evidences of guilt all around him.

I reluctantly leave this subject, fearing, trembling, that I have but too feebly discharged my duty. Enough rests on me, but more on you, gentlemen; we are not in an ordinary court of justice. We are in a temple dedicated to the Most High God, where prayer and supplication are wont to be offered up to high heaven. The solemnity of the place and occasion should impress on your minds the importance of the matter which you are selected from among your fellow-men to adjudge. When your verdict shall have been rendered, this vast assemblage will dissolve to be called together no more

on earth, but will again assemble and on that great day, foreseen by the exile of Patmos, who in the record of his vision said, "I saw the dead, both small and great stand before God—I saw the books opened and the dead, both small and great were adjudged out of the books." When that day shall arrive, gentlemen, may you stand before the great tribunal unspotted from the blood of your fellow-man.

*Mr. Blake* paid a merited compliment to the eloquent gentleman who had just addressed the jury, remarking that the Government always was required to make out a case in prosecutions of this description.

He placed stress upon the circumstance that the body was found on the pile of wood in the cellar, dressed in clothes that were not soiled, as showing that the murder could not have been committed in the streets, which it will be recollected were very muddy at the time. The outside door of the cellar was opened twelve or fourteen inches, and could not be opened farther on account of the wood back of the door. The limbs were rigid, and it was with difficulty that the body, with the limbs in their original state, could be taken out through the outside door, circumstances which, in his opinion, went to show that the body could not have been put in the cellar through that door.

*Mr. Blake* went on to the inquiry, was there poison in the body of Edward Mathews, on the morning when it was found? In order to show there was poison he reviewed the evidence touching that point, there could be no possible object in putting poison in the bowl which contained the contents of the stomach, while lying behind the hogshead in Mr. Williams' shed, even if any person other than Mr. Williams knew it was there.

In reviewing the testimony of Professor Loomis, founded on researches in books on chemistry, he complimented that gentleman's skill in his profession, and dwelt with considerable force on the improbability of his being mistaken in the analysis made of the contents of the stomach of deceased.

March 22.

*Mr. Blake.* I am inclined to think, gentlemen, that you entertain but little doubt that the stomach did actually contain a large amount of poison, as Professor Loomis tells you there was, under the solemnity of an oath. We, therefore, pass from that to the inquiry, was there poison in the body? We find that the brain was softened, that the blood had left the heart and was distributed through the veins—that the lungs were highly charged, and that in the lower part of the stomach there was a purple spot, indicating the presence of some corrosive substance. Dr. Hill and others, who did not see the body, say they should expect such appearances, but do not think them absolutely certain. Medical men who have experimented on the bodies of animals find similar appearances, just as they, from their experience, expected. It has been agreed that the food which animals live upon differs from that partaken of by men, but dogs live on animal and vegetable substances, and the appearances of the stomach in dogs experimented upon, are exactly such as were expected. I acknowledge these indications are not quite as certain as that twice two make four, but they are very indicative of certain facts.

Dr. Thayer and Dr. Plaistead discovered the odor of prussic acid in the brain of the deceased, and one of them in the thorax. Now there is good proof that it was there. Dr. Smith testifies that he remembered the odor of prussic acid from having smelled it while a student eighteen years before, and Dr. Hubbard tells you that he should consider the odor as certain a test as any other. These, gentlemen, are what the lawyers call experts. They were under oath, and from their experience and their standing in society are entitled to belief. Dr. Hubbard tells you that he has examined a great many bodies and never detected the odor of prussic acid in them unless put there. He does not believe this acid is ever generated in the stomach, and says, as does also Dr. Hill, that there is no respectable authority to prove the acid is ever so generated. I do not see how you could have better evidence than this

of the presence of poison in a body, unless you yourselves were to see the poison placed there.

With regard to the quantities of prussic acid the prisoner had in his possession, with that he had already on hand, and that he purchased of Wales, he had more in his office at the time than he could have used in the course of his lifetime, without that purchased at Barnett's, in Boston. What did he want of all this poison, and the bottle, too, a substance never used in the practice of medicine? What was the object, what was the design? If he had wanted it to prescribe for patients would he not have got the two per cent acid, the strength of which he knew? Mr. Goodwin tells you he does not know the strength of the strongest acid, therefore, there is no point to start from in the dilution of it, did you believe he wished it for dilution? This strongest acid is not safe to be used for any honest purpose of medicine, the prisoner must have known it, he did know it.

Edward Mathews was seen to enter the prisoner's office on the evening of his death; he had then, as the prisoner himself says, \$1,800; and the next morning he was found poisoned in the prisoner's cellar. Now, who killed Edward Mathews? If the story of Flint is not true, what is the truth in the matter? Why is it not shown where Mathews was on that night after he left the office of the prisoner? This is all circumstantial evidence, it is true, but do you want, could you have stronger evidence founded on circumstances, than this?

It is a truth that has been stereotyped in the experience of the world, "that murder will out." It may be a slight circumstance that the doctor said the poison would escape before the contents of the stomach could be got to Brunswick, but how did he know it would escape? Arsenic would not escape, nor would morphine. They would have remained for years. But prussic acid escapes readily—it is a volatile substance, and how could the prisoner have known that the poison, if in the contents of the stomach would escape, unless he knew the character of the poison?

*Mr. Blake* here cited two cases from *Starkie* on Evidence, and the case of the State of Maine v. Sager, tried some fifteen years ago, as illustrations of the kind of circumstantial evidence required to convict. The evidence in the latter case was not so strong as in this, yet the defendant was convicted.

*Mr. Evans* objected to such argument. He did not like that comparisons should be instituted in this case—the jury that convicted Sager had nothing to do with this case. He had a right to refer to the case, but he had no right to say how strong the evidence was without introducing that evidence as a matter of law.

The COURT sustained the objection.

*Mr. Blake.* Thomas Flint has under oath given you a detail of what he saw on the night of the thirtieth of September. It is a horrible tale, a frightful story, but I believe it to be true. Flint, after being called by the prisoner, went to the office, when there the prisoner locked the door, and facing Flint, says, “I am going to reveal to you a secret which involves my life. That cursed little Ed Mathews came into the office, went to take a glass of brandy and fell down dead.” I will not attempt to describe the feelings of Flint—thunder-struck, astounded, he remained speechless. After recovering somewhat from the shock, various modes of disposing of the body were suggested. Finally it was taken to the cellar in the manner described, thrown on the wood, and left in the position in which it was found in the morning. Have we not made out a case here? I am sorry we have so done—I am sorry that a man whose prospects were so fair, and who had borne such a good character, should so have fallen. But the Grand Jury having found an indictment against him, it is right we should investigate the matter, and it is right the facts should come out. This testimony of Flint’s is of the sort the defense tells you is the most valid. It is positive, and I do not find a single important point in which he is contradicted, but many in which his testimony is corroborated. What was his appearance on the stand? That certainly was



well enough under the circumstances—was it not exceedingly good? He was questioned as to the whole course of his life, and not a single circumstance brought out in the course of the cross-examination, which did not show his character to have been good through his youth upward. Not a circumstance could be brought against his fair name up to the time of this transaction. The death being proved, the testimony of Thomas Flint alone is enough to convict the prisoner upon—and how much more weight ought to be attached to it, if it is sustained by corroborative facts and circumstances.

The prisoner was a man in good practice, whose character stood fair—a man much respected in the town where he belonged. When Flint came in and heard the astounding fact that the body of Edward Mathews was lying in the back room, he was struck with such astonishment he did not know how to proceed. He might have believed no murder had been committed, or if he did, was it safe for him to rush to the street and give the alarm had he desired to do so? There were blows upon the head of the deceased, and had Flint have given the alarm, he at the same time would have proclaimed his tutor a murderer. Had Coolidge any motive not to commit a second murder, and might he not have stricken him down had he approached the door? Had he the means, we know not. I know not what you would have done under such circumstances, but I pray God you may never be called upon to pass such a scathing ordeal.

The conduct of Flint, gentlemen, is somewhat difficult for us to look at in the correct light. I believe that he either thought his friend and tutor innocent of a murder, or else that through fear he did not dare to divulge what he knew. He has been guilty of an offense, it is true, for which he has reason to repent in sackcloth and ashes—he has committed moral, if not legal perjury, by swearing as he did, negatively it is true, before the Coroner's jury; but the fear of implicating his friend, and laboring as he did, under the deepest excitement, is some excuse for him. Men of nerve,

perhaps, would have done otherwise, perhaps they would not. After reflection, and after having seen his father, for it appears in evidence that he did write letters to his father, and that his father came to Waterville, he takes the proper course and discloses the facts in his knowledge, just as he ought to have done. The blame rests on him only that he did not make the disclosures before. The testimony of accomplices in crime should be supported by other testimony, most certainly, but Flint was not an accomplice in this murder—he knew nothing of it until after it was committed. He was an accessory after the fact, but not an accomplice.

I do not know that anything I can say further is necessary in this case. I do not know that if I shall close here, I would not have performed my whole duty, but there are some other circumstances in the case which I will touch upon. Edward Mathews procured from the bank \$1,500. He put it in his pocket, went to Charles Mathews' store, and there took a book of forms and commenced writing a mortgage—he took that book of forms, and with it in his possession went towards Dr. Coolidge's office. Have you not a right to infer that the book of forms and the money had something to do with some transaction with Dr. Coolidge? We have it in evidence that Mathews went from the Parker House to the prisoner's office in the evening, and we have the confession of the prisoner that he was there, because he says he loaned the deceased on that evening two hundred dollars. Well, he was in the office, now what was transacted there? The deadly potion was administered to the unsuspecting victim, with serpent-like subtlety; under the guise of friendship was transacted this most heinous crime. After the deed was committed the corpse was taken to the closet, but being found too small, the idea of placing it there was abandoned—the window was opened, but it struck the prisoner that blood might be found upon the casing, and that was abandoned; he went to the river, but finding it altogether unsafe to convey the body thither, he returned, went to Williams's and there meeting Flint, takes him to the office, and the body was removed and deposited in

the manner Flint has stated. This is the true state of the transaction, circumstances prove it, and you cannot reasonably believe it to have been otherwise.

The matter of character, gentlemen of the jury, is entitled to some weight. It has been testified to, by two witnesses from Oxford county, and two or three from Waterville, that he did sustain a good character, but have not some circumstances been developed which tend to show that his habits were not altogether correct? He had a large practice, and of the most respectable character, yet we find he was most desperately pressed for money, and in one case offered \$500 for the use of \$1,000 six months. He borrowed money of every one who would loan it to him. His notes laid over at the bank. His income, though large, was not sufficient to procure him the luxuries he desired, and allow him the indulgence of those appetites and passions which had become pressing from habit. I acknowledge there is an absence of sufficient motive in this case, for the commission of the murder, there even is an absence of sufficient motive for any murder ever committed, but a man was in the coolest blood murdered at Salem for a thousand dollars. A thousand dollars was not sufficient motive, but the act was committed. The founder of our religion was betrayed for thirty pieces of silver; this was not motive enough for the commission of the act, but it was committed. Nor can character be always relied upon, for we know that Arnold, who had ever sustained a good character, proved a traitor of the darkest dye; and it must not be forgotten that Washington, who was a good judge of character, placed the most implicit confidence in him. Previous good character should carry its weight, but it must be weighed with caution.

I invoke the jury, as honest men to give a verdict such as the law and the evidence should dictate, without regard to the punishment that might follow. I can only say that should a verdict of guilty be returned, the prisoner would await in confinement, his sentence one year, and that execution would then follow or not, as the public mind should dictate.

## THE CHARGE OF THE COURT.

CHIEF JUSTICE WHITMAN adverted to the custom in cases of this nature, of keeping the jury away from connection with their fellow-men, while hearing the evidence, and said he thought the course particularly correct in this case, where there had been more excitement and interest manifested than he had ever before witnessed.

He explained, by familiar comparisons, what is meant by the term malice, as applied to criminal actions, and told the jury that should they find the prisoner guilty, they must say whether it be of murder in the first or second degree, always remembering that the presence or absence of malice should form the basis of their decision. The sentence in one case would be death, at the expiration of one year's imprisonment, in the other imprisonment for life.

In the present case the last seen of Mathews was that he went to the office of the prisoner and in the morning following was found dead in a cellar under the prisoner's office, killed by prussic acid. It was proper that the testimony should be carefully weighed with regard to the prussic acid, as to whether the prisoner might not have taken or procured the acid elsewhere. The fact that persons seldom commit offenses without a motive, should be borne in mind, and applied to this case with all due force. In regard to the testimony of Flint, he desired the jury to consider whether, although he had perjured himself before the Coroner's jury, in swearing as he had done, he had not gone contrary to his interests, and been forced to do it from compunctions of conscience. How much weight was to be attached to his testimony should be decided on this consideration, as well as on the basis of corroborative circumstances.

The Government had endeavored to make out a motive for the deed, supposing that the prisoner was in very embarrassed circumstances, while the defense had endeavored to show that he was abundantly supplied with money. The proof with regard to this point should be carefully considered.

The prisoner had said that he had loaned the deceased \$200 to be paid the next morning. What use the deceased might have for \$200 for so short a time when he had \$1,500 or more in his pocket, was a circumstance entitled to some weight.

Perhaps as strong a circumstance in the case as any the Government had made out, was that the prisoner had purchased a large quantity of prussic acid, some of which was not fit for the purposes of his profession. It would be competent for the jury to inquire for what purposes these large amounts of poison were purchased. It would be well to consider whether this sort of poison was kept by any person in the town of Waterville, except the prisoner. No proof has appeared that any of the physicians or apothecaries there had it in their possession.

Was it probable that the prisoner had put prussic acid in the bowl containing the contents of the stomach, while it was lying behind the hogshead under the shed? Would he have any object in so doing? If the acid was put in there who could have done it—who had such acid, for what object could it have been put there? These he considered weighty circumstances.

He had full faith in the chemical tests of Professor Loomis and the other experts. Their testimony was entirely legal.

There was a communication from the prisoner's office to the cellar—the prisoner's clothes were not soiled, as would probably have been the case had he been knocked down in the street. In considering circumstantial evidence, indications of this character had force which ought to be considered.

The testimony of Flint was corroborated in some parts, in others it was contradicted. Whether the presence of Dr. Coolidge at the inquest when Flint testified falsely, if he had testified truly here, had an influence on his mind, or whether he was actuated by fear, should all be considered in weighing his testimony.

Having touched on these prominent points of the evidence, and the circumstances growing out of such auxiliaries to the testimony in the case, he admonished the jury to weigh and

amply consider each and every point, and return such a verdict as after mature deliberation they should find.

#### VERDICT AND SENTENCE.

*March 22.*

The *Jury*, after an absence of about twenty-four hours, during which time they were twice brought before the Court, and returned to their room, returned a verdict of *Guilty of Murder in the First Degree*; founded on the last three counts of the indictment.

*March 23.*

The *Prisoner* was sentenced to be taken to the State Prison at Thomaston, there to remain in solitary confinement, and at hard labor one year; and at the expiration of that time, or as soon thereafter as the Governor might direct, to be hanged by the neck until dead.<sup>a</sup>

<sup>a</sup> Dr. Coolidge was not hanged; and there is a mystery as to his end. According to some authorities, he died in prison, but there is very strong evidence that he made his escape with the connivance of someone in authority. See *ante* "Preface."

THE TRIAL OF RAYMER C. WERTENDYKE AND  
JAMES PIKE FOR FALSE IMPRISONMENT  
AND OF ROBERT R. BROWNE FOR  
ASSAULT AND BATTERY, NEW  
YORK CITY, 1822.

THE NARRATIVE.

Mr. Browne, a stranger in the city, concluded one pleasant autumn evening to attend a service at a near-by church, where he took a seat in the gallery. Perhaps the sermon was long and dull, or the room may have been too warm; for some cause or other he determined to leave and at the beginning of the final prayer he proceeded to descend. But he was stopped on the stairs by an usher, who told him that it was a rule of the church that no one could go out of the building during divine service except with the express permission of the officials. Mr. Browne persisted and said he would go out if he wished, and two of the officials, Wertendyke and Pike, hearing the noise, came out to the porch and tried to keep him inside. Browne resisted, and the result was a great noise and tumult which ended in Browne being handed over to the police.

All three were afterwards indicted, the two church officials for false imprisonment and Browne for assault and battery. The Judge charged that all three were in the wrong and the jury being of the same opinion, acquitted them all.

THE TRIAL.<sup>1</sup>

*In the Court of General Sessions, New York City, February, 1822.*

HON. RICHARD RIKER,<sup>2</sup> *Recorder.*

JACOB B. TAYLOR, }  
HENRY MEAD, } *Aldermen.*

Indictments having been previously found against the

<sup>1</sup> Wheeler's Criminal Cases, 1 Am. St. Tr. 108.

<sup>2</sup> See 1 Am. St. Tr. 361.



three defendants, one against Wertendyke and Pike for false imprisonment, and one against Browne for assault and battery. As the charges grew out of the same circumstances, it was agreed that all three of the defendants should be tried at the same time before the same jury.

*Mr. Marvell,*<sup>3</sup> for the People.

*Mr. Wilson,*<sup>4</sup> for Browne. The other two defendants appeared for themselves.

#### THE EVIDENCE.

The witnesses stated the facts to be as follows: Wertendyke and Pike were officers of the church at the corner of Christy and Delancy streets, in this city. The authorities of this church had passed a regulation that no person should go out of the church, during divine service, without their express permission. Browne, who was a stranger in this city, went to worship in this church on the evening of Sunday, the 15th of September, 1821. During the service, and at the commencement of the last prayer, Browne arose from his seat, in the gallery of the church, and walked

with some force to the stairs leading to the door of the church. He was stopped on the stairs by Mr. Marrine, an usher, and told he could not proceed: that it was against the rules of the church. He, however, persisted in going out. He was stopped at the bottom of the stairs by Wertendyke and Pike, and pushed with great violence against the wall. A considerable noise and tumult arose in, and about the door of the church. The two church officials called for the police, who came, and at their request took Browne into custody.

The RECORDER (to the jury). On the facts stated we think the conduct of Browne is open to censure. It is the duty of every person attending church, no matter of what denomination, to pay that respect to the place and the people assembled there, as not to disturb or molest them in their worship. Under the free constitution of this country, no man is compelled to go to any particular church, or indeed to any church at all, but if he does go, (as it is the duty of every man to go to some church) it is his duty to behave himself, while there, with decorum and respect.

<sup>3</sup> I Am. St. Tr. 62.

<sup>4</sup> *Id.* 363.

But now as to the rule or regulation passed, and attempted to be put into execution by the officers of this church, we think it clearly illegal; it is an infringement upon natural liberty and private right not to be tolerated; nor can it, in law, excuse or protect the officers of the church from the responsibility of any crime they may commit in enforcing such illegal rule.

The *Jury*, in accordance with the charge of the COURT, intimated their disapprobation of the conduct of each of the parties, by finding a verdict of *Not Guilty* on each of the indictments.

## **THE TRIAL OF COLONEL DAVID HENLEY, FOR IMPROPER CONDUCT AS AN OFFICER OF THE AMERICAN ARMY, MASS- ACHUSETTS, 1778.**

### **THE NARRATIVE.**

One of the earliest great victories of the American Army in the War of the Revolution was the surrender of General Burgoyne and his whole force to General Gates,<sup>1</sup> which occurred at Saratoga on the 17th of October, 1777. A convention was entered into between the two generals, which provided that the British army should be marched to the port of Boston, and should be allowed a free embarkation and passage to Europe, upon condition of not serving again in America. The army was not to be separated, nor the men from the officers. The officers were to be admitted on parole, and suffered to wear their side-arms. All private property was to be retained, and no baggage was to be searched or molested. The army immediately took up its march for Boston and was quartered in Cambridge.

But the quartering of these soldiers was not regarded with much favor; and the people, who held General Burgoyne and his army in the utmost detestation, did not exert themselves very much for their accommodation. Good houses and lodgings were scarce, and so were food and fuel. The soldiers were soon indignant at what they considered harsh treatment, and took no pains to conceal their contempt for the people whose prisoners they were. The officers forgot the relation

<sup>1</sup> GATES, HORATIO (1728-1806.) Born in Malden, England. Early entered a military career. Was sent to America and was with Braddock's expedition. Made a Brigadier General of the Continental Army in 1775 and defeated General Burgoyne at Saratoga in 1777. Defeated by Cornwallis in 1780 and removed; acquitted by court-martial. Settled on a plantation in Virginia, but removed to New York City in 1790, where he died.

in which they stood to their captors, and indulged in a haughtiness and arrogance of manner, both unbecoming and annoying. But the American officers had been strictly enjoined to be attentive to the conduct of the prisoners, and to report any insult offered to the independence of the states or the proceedings of congress. The offender was to be immediately arrested, and, if a prompt and full apology was not made, he was to be confined to the guard-house for a time proportioned to the magnitude of his indiscretion.

The prisoners, however, paid no further respect to the rules and regulations of their captors than they were compelled to do by external force. They often stole out of camp, and not infrequently committed depredations on the neighboring farms. Highway robberies were not uncommon, and, in one instance at least, an aggravated murder was committed. Passes were constantly counterfeited; and officers lent their side-arms, or suffered favored soldiers to take them, in order to deceive the sentries after dark. When this artifice was finally discovered, the prisoners who had a right to wear them were often stopped by the guards, and hence there arose complaints without number of the insolence of the American sentinels.

Colonel Henley, the American officer in immediate command at Cambridge, was a brave man and a good officer, but of a somewhat irritable and impetuous disposition. Coming into frequent personal collisions with the prisoners, and sometimes being pressed beyond endurance by the outrageous insolence of the soldiers, he adopted a course of punishment, which was severe; but it should be remembered that he was constantly placed in a trying situation, when the most decisive and energetic action was necessary. On January 8, 1778, a report was made to the commanding officer that, in the night before, a British soldier had thrown a stone at a sentry, which had knocked him down, deprived him of reason, and nearly killed him. Search was immediately made for the offender and the sentry's musket, which had been taken off. The prisoners resisted the search, and, being armed with

clubs and stones, prepared to attack the guard. They were charged, however, with clubbed firelocks, driven from barrack to barrack, and thirty of their number taken prisoners, who were ordered to be transferred to the guard-ship. Meanwhile the British soldiers again assembled, and were ordered to disperse. They in effect refused to obey, and pressed upon the guard, loading the Americans with the most insolent abuse. They also succeeded in rescuing one man, when decisive measures became necessary. Colonel Henley accordingly rushed upon the crowd with fixed bayonets, and himself pricked a British soldier with his sword.

As soon as General Burgoyne heard of this, he addressed a letter to General Heath, the American commander, in which he demanded the release of the prisoners who had been transferred to the guard-ship, together with a satisfactory apology, and concluded in the following terms:

“Insults and provocations, at which the most placid dispositions would revolt, are daily given to the officers and soldiers of this army. Regular, decent complaints are received by your officers, sometimes with haughtiness, sometimes with derision, but always without redress. These evils flow, sir, from the general tenor of language and conduct held by Colonel Henley, which encourages his inferiors, and seems calculated to excite the most bloody purposes. For want of sufficient information, and not bringing myself to believe it possible that facts as related by common report could be true, I have hitherto declined taking public notice of this man; but upon positive grounds, I now and hereby formally accuse Colonel Henley of behavior heinously criminal as an officer, and unbecoming a man; of the most indecent, violent, vindictive severity against unarmed man; and of intentional murder. I demand prompt and satisfactory justice, and will not doubt your readiness to give it. Whenever you will inform me that a proper tribunal is appointed, I will take care that undeniable evidence shall be produced to support these charges.”

General Heath at once ordered a court of inquiry to investigate the grounds of the complaint of General Burgoyne, and the report was, that “it would be most for the honor of Colonel Henley, as well as for the satisfaction of all interested, that the judgment of a court martial should be taken on his conduct, during his command at Cambridge.” Accordingly, a special court martial was ordered to sit at the court house in

Cambridge "for the trial of Colonel David Henley, late commanding officer at that post, accused by Lieutenant General Burgoyne, of a general tenor of language and conduct heinously criminal as an officer, and unbecoming a man; of the most indecent, violent, vindictive severity against unarmed men, and of intentional murder."

The court martial convened in the court house at Cambridge, on January 20, 1877, and lasted five days. Both General Burgoyne and Colonel Henley appeared in person. The charges were certainly not proved and the American commander was honorably acquitted. The result was received with great enthusiasm by the Continental army and was just as greatly complained of by the British officers and men.

### THE TRIAL.<sup>3</sup>

*Before a Military Commission Held at Cambridge, Massachusetts, January, 1779.*

BRIGADIER GENERAL JOHN GLOVER,<sup>4</sup> *President.*<sup>4a</sup>

*January 20.*

The Court Martial ordered by General Heath<sup>5</sup> on the complaint of General Burgoyne, assembled today at the court house at Cambridge.

*Lieutenant Colonel William Tudor,*<sup>6</sup> *Judge Advocate.*

*Lieutenant General Burgoyne*<sup>7</sup> *appeared in person.*

<sup>3</sup> *Bibliography.* \*Chandler's American Criminal Trials. See 1 Am. St. Tr. 116.

<sup>4</sup> GLOVER, JOHN (1732-1797). Born Salem, Mass. A sailing-master and fisherman, he recruited a regiment and rendered such service to the Patriot Army that in 1777 he was made Brigadier General. He aided in the defeat of Burgoyne at Saratoga and transported to Cambridge the army that surrendered there. Was a member of the court-martial that tried and condemned Major Andre.

<sup>4a</sup> The other members of the court martial were: Colonels Wesson, M. Jackson, Lee, H. Jackson, Lieutenant Colonels Colman, Badlam, Popkin, Major Curtis, Captains Randall, Langdon, Sewall, and Hastings. Lieutenant Colonel William Tudor was Judge Advocate.

<sup>5</sup> HEATH, WILLIAM (1737-1814). Born Roxbury, Mass. Brigadier General Continental Army 1775, Major General 1776. Mem-

*Colonel Henley*<sup>6</sup> appeared before the Court, and the following charge was exhibited against him: "Lieutenant General Burgoyne accuses Colonel Henley of a general tenor of language and conduct heinously criminal as an officer, and unbecoming a man; of the most indecent, violent, vindictive severity against unarmed men; and of intentional murder."

*Colonel Henley* answered that he was *Not Guilty*.

*General Burgoyne*. I noticed a distinction between the charge, as stated in my letter, and General Heath's order.<sup>7</sup> In

ber Massachusetts Constitutional Convention; State Senate 1791, Probate Judge 1793, Lieutenant Governor 1806.

<sup>6</sup> TUDOR, WILLIAM (1755-1819). Born Boston, Mass. Graduated Harvard 1769. Admitted to the bar 1772. Colonel and Judge Advocate General Continental Army 1775-1778. After the Revolution practiced law and rose to eminence in his profession. Member of the Massachusetts House and Senate. Secretary of State 1809. Vice President Society of the Cincinnati, and a founder of the Massachusetts Historical Society. In London, he was once presented at court. On the mention of his name the king exclaimed: "Tudor! What one of us?" The interview continued so long that the Lord in Waiting, growing impatient, said: "His Majesty seems to be so deeply engaged with his cousin, that he forgets what a number of persons are in waiting to be presented."

<sup>7</sup> BURGOYNE, JOHN (1722-1792). Born in England and early entered the army. Captain and Lieutenant Colonel 1758. Member of Parliament 1761. General in Portugal 1762. Appointed head of the British Army to subdue the American Colonies by way of Canada in 1777, but was defeated and surrendered to General Gates at Saratoga. On his return home to England he was coldly received by the ministry, and was neglected by the court, his surrender at Saratoga being charged as an act of cowardice. Upon his repeated and earnest solicitation, an inquiry was instituted by Parliament into his conduct on the expedition. It was, however, broken off by the prorogation of Parliament, and never was resumed. After his return he again became a member of the House of Commons, where he annoyed the ministers by the ability and zeal of his opposition, and they ordered him back to America. He refused to obey, and resigned his commission. In his later days he engaged in literary and dramatic work and wrote three dramas of considerable merit.

<sup>8</sup> HENLEY, DAVID. Colonel Henley was a native of Charlestown, Mass., and was bred to a mercantile calling. At the commencement of the Revolution he resided in Virginia, and was personally known to General Washington. After his trial he left the command in Cambridge and before the end of the war he retired from the army and went into business with the father of Harrison Gray Otis.

<sup>9</sup> See ante "The Narrative," p. 808.



the letter, the general tenor of Colonel Henley's language and conduct, encouraging his inferiors, and seemingly calculated to excite them to bloody purposes, was only stated as a matter of suspicious belief; reasoning upon this principle, it was more candid to suppose one instigator of such evils, than a general, voluntary, bad disposition among the American troops. The direct matter of charge which I pledged myself formally and officially to support, was contained in the words, "behavior criminal as an officer, and unbecoming a man, of the most indecent, violent, vindictive severity against unarmed men, and of intentional murder."

*General Burgoyne.* I make this observation, as a security against any censure of inconsistency on my part, for not going at large into matters of inferior moment, as to the general tenor of language and conduct of Colonel Henley, for I shall confine my evidence to transactions of the nineteenth of December and the eighth of January, except in cases where the behavior of Colonel Henley, at other times, served to elucidate the principles and designs upon which he acted upon those particular days.

With this observation, as to the distinction in the charge, Mr. President, and Gentlemen of the Court, I present myself as prosecutor before you, in charges of a heinous nature against Colonel Henley; and, before I proceed to adduce the evidence in support of them, I think it a duty to my station, and a part of propriety towards the Court, to declare the principles upon which I act. If the reports in my hand, and which will presently be brought to test upon oath, do not deceive me, public faith has been shaken, wanton barbarities have been committed, and a general massacre of the troops under my care, apparently threatened. In objects of this magnitude, where not only the rights of a single nation, but the interests of human nature are concerned, the conduct of the prosecution falls naturally (however disagreeable the office and unequal the talents of the person) to him who has the supreme trust upon the spot.

A second inducement to appear here, is that of private honor. I have undertaken to accuse Colonel Henley, in a degree that ought to affect the feelings of a soldier nearer than life. It is fit I stand forth, in person, to maintain my accusation, and if it fails in point of proof, to make him the fullest atonement in my power.

I acknowledge a third impulsion upon my mind, equally irresistible—gratitude, esteem and affection to that meritorious, respectable part of my country, the brave and honest British soldier—a private man, defenseless, because unarmed, ignorant of your laws, unqualified to make good his cause in a court of justice, and who has not to look for redress of injury to his own officers. I confess I am too selfish to resign to my brother officers the pride and gratification of standing in the front, for the defense of men, faithful comrades of honor and misfortune—who have fought bravely under my orders, who have bled in my presence, and who are now exposed to oppression and persecution, by the abuse of a treaty signed by my hand.

Thus much I thought proper to premise, lest any man should suppose me actuated by so mean and paltry a motive, as vindictive personal resentment against a gentleman, too, of whom, before these transactions, I could know no harm, and towards whom, if I had any prejudice, I seriously declare it was, from his general deportment, a prejudice of favor. Personal resentment! No, gentlemen, I stand upon broader and firmer ground—the ground of natural rights, personal protection and public honor—and I appeal to the great principles and landmarks by which human societies hold and are directed, and which, whether in situations of amity or hostility, are esteemed equally sacred by the universal concurrence of civilized man.

And this leads me to a momentary reflection upon the order under which you sit, originating from the report of the court of inquiry. It states, that the court, after mature consideration, are of opinion, that from the evidence offered on the side of General Burgoyne against Colonel Henley, it will be

most for the honor of Colonel Henley, as well as for the satisfaction of all interested, that the judgment of a court martial should be taken on his conduct, during his command at Cambridge. The General approving the opinion of the Court, orders, etc.

I confess I expected General Heath would have joined issue with the prosecutor, in this instance, and placed the court martial upon a more enlarged basis than the honor of an individual, however respectable he may be, or the satisfaction of the complainants. But be it as it may, my purpose is answered, a court martial is obtained, the members are sworn, and they are bound to decide.

I know you will feel with me the difference between this and common courts; such a state of the minutes as would suffice for your internal conviction, after hearing the evidence, or as would be merely explanatory to the person who is to confirm the sentence, will not be thought sufficient here. You well know the whole of this matter will be published, translated, considered and commented upon by every nation in the world; not only reality, but perspicuity of justice must appear upon the face of the proceedings. You are trustees for the honor of an infant state, and therefore evasion, subterfuge and law-craft, were any man hardy enough to offer such at your tribunal, would be of no avail; nay, were it possible any member could be warped unintentionally by personal favor, or prejudice of civil contest, (good minds are sometimes prone to such illusions) yet here a moment's reflection upon the reputation of his country, would retrieve his reason, and what his prejudice would incline him to adopt, policy would prompt him to reject.

Upon the full confidence, therefore, of the necessary, as well as willing justice of the Court, I shall proceed to call the evidence. I have neither inclination nor power to heighten the facts by a previous narrative; let them strike the view as truth shall show them in all the simplicity of their horrors—a monstrous spectacle, from which the mind and eye will turn aside with detestation.

## THE EVIDENCE FOR THE CHARGES.

*Corporal Buchanan.* Was present at the barracks on Prospect Hill on December 1. Colonel Henley ordered a number of the British soldiers, who were prisoners, out of the guard-house. He asked Corporal Reeves what he was confined for. Reeves said that he had affronted one of the provincial officers, not knowing him to be an officer, and he was sorry for it. Colonel Henley replied, "Sir, if you had served me so, I would have run you through the body, and I believe you to be a great rascal." Reeves answered, "Sir, I am no rascal, but a good soldier, and my officers know it." Colonel Henley demanded silence. Reeves repeated, "I am no rascal, but a good soldier, and I hope soon to be under the command of General Howe, to carry arms, and to fight for my king and country." Colonel Henley said, "Damn your king and country—when you had arms you were willing to lay them down." Reeves said he was not willing to lay them down. Colonel Henley again ordered silence; Reeves not obeying, but repeating the same words, Colonel Henley ordered one of the guard to run him through the body. The man not obeying him, Colonel Henley dismounted from his horse, and seizing a firelock with a fixed bayonet from one of the guard, stabbed Reeves in the left breast. While the bayonet was at Reeves' breast, Colonel Henley told him if he said another word he would have it through his body. Reeves said he did not care; he would stand for his king and country till he died. Col-

onel Henley made another push at him, when I threw up my hand and turned the bayonet over Reeves' shoulder. Told Colonel Henley the man was a prisoner, and said, "Don't take his life; as he is now in your custody, you can't take other means with him." Colonel Henley returned the firelock to the man of the guard he took it from, and then ordered Reeves and myself into the guard-room, and dismissed the rest of the prisoners.

*General Burgoyne.* When Colonel Henley made the second pass at Reeves, where would it have struck him had you not thrown the bayonet up with your hand? Much about the same place in the left breast. When Colonel Henley demanded silence, did he direct himself particularly to Reeves? I can't tell, as there was ten or a dozen prisoners who were making their excuses together. Was there not much noise and what sounds made by the prisoners? It was excusing themselves to one another, so that Colonel Henley might hear them; that they had been confined there for some nights, and they should take care not to come there again. Was there any muttering or grumbling, or insolent looks directed to Colonel Henley? No, but quite the reverse; the men seemed pleased at being released.

*Alexander Thompson.* Belong to the 29th regiment. Was at the barracks on Prospect Hill on December 19th. Colonel Henley ordered the prisoners out of the guard-house, of whom I was one. The prisoners were drawn up

before the guard-room window, the guard in their front. Colonel Henley from a paper read the crimes at the right of the line of the prisoners, and said, "Now soldiers I am come to release you, and hope you will behave better for the future." He told Corporal Reeves he was confined for abusing an officer of the Continental service; and asked him what was the reason of his abuse? Reeves replied he did not know the reason of the abuse, as he was in liquor at the time, but said he was very sorry for it, not knowing him to be an officer. Colonel Henley then said, "Had it been me, I would have certainly run you through the body; I believe you to be a rascal." Reeves said he was no rascal, but was a good soldier, and his officers knew it. Colonel Henley demanded silence, and Reeves again said that he was a good soldier, and hoped, in a short time, to fight under General Howe for his king and country. Colonel Henley then said, "Damn your king and country; when you had arms you were willing to lay them down." Corporal Reeves made answer that he was not willing to lay them down, and had he then arms, he would do his utmost to fight for his king and country. Colonel Henley then ordered one of his guard to run the rascal through. The man not obeying, he dismounted, seized a firelock with a fixed bayonet from one of the guard, extended his arm above his head, with his hand on the butt of the firelock, and made a pass at Corporal Reeves, and pricked him near the nipple of the left breast; he then drew back the firelock and made an-

other pass at him. I seized hold of the socket of the bayonet, and begged Colonel Henley not to take his life, that he might use other means of satisfaction, and begged he would send him into the guard-room again. Colonel Henley then ordered Reeves into the guard-room, the guard committed him, and Colonel Henley went on to speak to the rest of the prisoners. Reeves put his head out of the guard-house window and said something, but I do not know what. Colonel Henley then released the rest of the prisoners, except Buchanan, who was ordered into the guard-house.

*The President.* Was there nothing said by Reeves between the first and second pass of Colonel Henley? No. Did not Colonel Henley frequently command silence before he stabbed Reeves? He did more than once or twice. Did not Colonel Henley direct himself to Reeves when he demanded silence? He looked first at Reeves, and then along the line of the prisoners. Was not Reeves more talkative than any of the other prisoners? He was. Was there anything said about King Hancock? I heard nothing.

*Corporal Buchanan* (recalled.) After Reeves was returned to the guard-room, and the other prisoners dismissed, Reeves said to me, "This is a poor pass I am come to, to be taken out of the guard-house and stabbed, and my king and country damned—damn King Hancock and the Congress." Colonel Henley might have heard it.

*Dr. Bowen.* Am Surgeon of the Ninth Regiment. Saw Cor-

poral Reeves a few hours after he was wounded; the wound appeared to be made by a bayonet; it penetrated the breast a little above the left nipple; it was not so bad as to require immediate dressing; it was slight; it did not penetrate deep enough to be of any consequence; it might have drawn a drop or two of blood.

*General Burgoyne.* What further depth would have put his life in danger? An inch farther might have rendered the wound hazardous. Was the direction of the wound towards the heart, or a mortal part? It was not towards the heart, but towards a mortal part.

*Page.* Am a soldier of the 24th Regiment. Was at the barracks, on Prospect Hill, on January 8th. About 11 in the morning, saw a guard of Continental soldiers coming up from Winter Hill; when they came near the British guard-house a number of us were standing to see them march by. Happened to tread on one of my comrade's toes, and he cried out, "God damn my soul," when a sergeant (as I took him to be, as he was out of the ranks) turned about, stepped back two or three paces, and stabbed him in the right breast; then drew out his bayonet from the man's breast, and said to the man, "Damn you, you rascal, do you damn me?" The soldier made answer, "No." I said that he did not speak to him; he then made another push at him, and pricked him the second time, and then clubbed his firelock and cut him on his right temple. A provincial officer came from the rear of the party and damned us for rascals, and told us we all deserved it. Did

not see Colonel Henley near during this. Fifty or sixty British soldiers were together when the party passed them.

*General Burgoyne.* What number did the provincial guard consist of? I guess about one hundred and fifty. Did you see any insult by word or gesture passed from the British soldiers towards the guard? I did not. Did you hear any provincial officer or soldier complain of any affront offered? I did not, except what passed as before related.

*The President.* Did the British soldiers give the party full room to march in the same open order after they came up to them as before? There was full room where I stood for the party to pass.

*Walker.* Am Surgeon's Mate of the 24th Regiment. On January 8th, about 11, I dressed a British soldier who had just before been wounded; his name was Traggot; there were two orifices just above the right breast, which the man told me had been done by two different stabs of the bayonet. From the free communication of the two orifices should have thought it had been only one wound. The wound was not dangerous. Have dressed it several times since, and at present it is in a fair way of a cure; saw no other wound nor any marks of beating about the man. Am of opinion, from the nature of the wound, it was done by one push. The man did not complain of any wound.

*Major Foster.* Belong to the 21st Regiment. Was present on the occasion referred to. Neither saw nor heard any provocation on the part of the British sol-

diers towards the Continental guard. When the rear of the guard came near the British guard-room, noticed a scuffle. The guard passed on, and I found Traggot, a British soldier, was wounded. I ordered the men to disperse and they did so immediately.

*Corporal Kidley.* Saw a wound inflicted on another soldier on the same occasion. Colonel Henley came up with a party of American soldiers, and after forming them into two columns, ordered them to load. He told them that the first man who rescued a prisoner out of his hands, he would blow his brains out. He then ordered the British soldiers to leave the parade immediately. They moved off, but Colonel Henley, finding that they did not move as fast as he expected, rushed forward and stabbed Corporal Hadley. He followed another soldier, threatening to run him through if he did not go off the parade. The wound of Hadley was not severe, and he was only confined by it a short time.

*Colonel Anstruther.* Am the British officer in command. I called on Colonel Henley, who informed me that the British soldiers had behaved so badly that morning that he was obliged to run one of them through the body, and that some others had been hurt by his men's bayonets.

*Colonel Lind.* Belong to the 20th Regiment. About 22d December, being field-officer of the week, I was going upon Prospect Hill, in the forenoon, with Captain Banks, of the same regiment. Saw three women coming down the hill, one of which run past a Continental sentry,

who called upon her to stop, and immediately fired his piece before she had time to turn round; the ball, from the noise, passed between the woman and myself, and near me. Ordered the woman to go back, and went up to the sentry and asked him if he was not ashamed to fire upon a helpless woman. He replied he had orders for so doing. Went to a sergeant's guard, which was just by; told the sergeant what had happened, and desired him to confine the sentry, that the affair might be inquired into. He told me he would not confine him; that they had orders to fire upon all British soldiers and women who attempted to pass the sentries. Observed a number of British soldiers were collecting, who were murmuring and clamoring at the time. For fear of the consequences, desired them immediately to disperse and go to their barracks, and promised them my endeavor to get them redressed. Went towards the main or captain's guard, and in my way was stopped by a provincial sentry, who charged his bayonet upon me, with the muzzle pointed at my breast. Told him I only wanted to speak to the captain of the guard, and did not want to go further, and begged he would call him, and remove the muzzle of his gun from my breast. He said he would keep the muzzle there, and bid me keep off, and then called the sergeant of the guard, who immediately came up. Desired him to order the sentry to remove his firelock, as I was an officer, and commanded in the barracks, and wanted to speak to the captain of the guard upon business. The



sergeant told the man to take away his gun, telling me he was a young soldier, and did not know better. The captain of the guard came up soon after, and I pulled my hat off, which he took no notice of. Told him of the sentry's firing on the woman, and begged the sentry might be confined till the affair should be inquired into. He told me that he would not, and that the sentries had particular orders to fire on all women who attempted to pass the sentries, as well as soldiers. I said it must be some mistake. He replied it was none of his business; they were his orders, and I must seek redress somewhere else, and we parted. From the position of the sentry at the time he fired, passengers on the road were exposed to the shot. No report of this transaction was made to Colonel Henley that I know of.

*John Fleming.* Am sergeant of the 47th Regiment. About 16th was at the door with a num-

ber of the sergeants of the office, to apply for passes. Mistook Colonel Henley for Mr. Keith, the Deputy Adjutant General, and saluting him, was just going to address him when Colonel Henley extended his arm, with his fist clenched, and exclaimed: "You rascal, I'll make damnation fly out of you, and I will myself one of these nights go the rounds, and if I hear the least word or noise in your barrack, I'll pour shot amongst you, and make flames of hell jump out of you, and turn your barracks inside out. Ye are all a parcel of rascals." He said if he was a sentry and a British soldier looked sulky at him, he would blow his brains out. I asked whether anything was amiss. He said there was, for that the last night one of his sentries had been knocked down by some of our people. He moderated his passion, and a very few words passed afterwards.

*General Burgoyne* asked to address the Court upon the facts as proved.

The *Judge Advocate* interposed an objection. He contended, that in courts martial there was no prosecutor but the Judge Advocate. There had been instances of counsel being allowed a prisoner, but not against him. Still, if Colonel Henley had no objection, and the Court conceded it as an indulgence, he should acquiesce.

*General Burgoyne* expressed surprise at the Judge Advocate's exception being made so late in the case; he thought it more particularly extraordinary, as the general had not only stated his idea of the mode of proceeding at the first, in which the Judge Advocate had acquiesced, but at the last meeting it had been fully discussed in open court between them, and the Judge Advocate had agreed to his right, both

of applying the evidence upon the charge, and also of replying to the defense, provided the Judge Advocate had the closing of the whole. He averred that, had the Court declared against this claim in the beginning, or could he have expected such objection, he should have examined the witnesses in a very different manner, in order to bring several matters more fully and pointedly before the Court, than he thought necessary to do upon the supposition of a future occasion, to explain the reasons of his questions, and by deduction and inference to make the application. He nevertheless proposed that the principle upon which he spoke should lie dormant to avoid trouble to the Court; that he had his own opinion upon the right, the Judge Advocate might retain his upon the indulgence, and provided nothing concerning the matter was entered upon the proceedings, he should make use of the power without further question.

*Colonel Henley.* Mr. President and Gentlemen of the Court; I have no objection to General Burgoyne's making use of all the rhetoric in his power against me; I stand on such firm ground, I can safely trust my reputation in your hands, against every effort of my prosecutor to ruin me.

The COURT, after consultation, informed *General Burgoyne* that he might proceed.

*General Burgoyne.* Mr. President, and Gentlemen of the Court: It being now admitted, that in closing the evidence, I may offer such arguments as to me shall seem proper, in support of the charge, and reserving to myself a claim of replying to the defense, I shall enter upon the first part of the very painful, though by no means difficult undertaking—painful, because I cannot pursue the offender without setting that offender in points of view, at which every benignant mind must shudder—easy in every other respect is the task, because I will venture to pronounce the evidence, when arranged and adjusted, will amount to such a mass of proof as cannot be overthrown, and will authorize and call for the strongest terms I can use, in my demand of public justice. And, gentlemen, let me be permitted to assume to my-

self applause rather than blame, that the evidence has not been laid before you in a regular series; the reason was, that though assured by the reports made to me, that the evidence would produce conviction upon the whole, I was ignorant how the testimony of the particular witnesses would apply, and point to the progression of the charges, because I had no previous intercourse with them. I declare, upon my solemn word and honor, that I had no concern or communication, directly or indirectly, with any noncommissioned officer or soldier who has appeared at your bar, one only excepted, namely, Sergeant Fleming, of the forty-seventh regiment, who has deposed to the salutation Colonel Henley gave him and his comrades at the Adjutant General's office; the whole matter appeared so very improbable, that I not only sent for the sergeant, to warn him of the sacredness of an oath, and the crime of intemperate zeal that led to bearing false witness; but also I thought it my duty to inquire minutely into his character. I found the man firm and uniform in asserting his facts; and I found his officers unanimous in supporting the credit of his veracity.

In every other circumstance I adhered religiously to the determination I had taken, of secluding myself from the witnesses, not only to guard my character, in this region of suspicion and aspersion, against the supposition of unfair practices; I besides had a scruple of trusting my own mind with too hasty prepossessions in a cause where, with the solemn matter of a public nature, is involved the fate of a gentleman, high in his military station, and to judge by the apparent signs of good wishes on this day, high in popular esteem.

Thus unprejudiced I came into court. I scorn to take the slightest matters that might be comprehended in the general words of the charge, such as personal incivility to the officers, expressions and actions of peevishness, haughtiness and disgust. I mean not to press, that they existed, or if they did, I am desirous that they should pass as faults of temper and deficiencies of manners, incident to man's nature, education, and habitual course of life; and I shall confine my comments,

as it is my duty to do, to the testimonies of your minutes, and the circumstances relating to them.

Without departing from this principle, it will be necessary to take a general view of the state of things previous to the date of the grievances complained of. We arrived at Cambridge, passengers through your country, under the sanction of a truce. In whatever capacity we had been found in a foreign, and as you intend, an independent state, we were entitled to a personal protection, by the general and most sacred laws of custom and reason; but when, to the promulgated law of civilization, are added, the unwritten principles—or written only upon the hearts of generous people—honor, respect for the brave, the hospitable wishes that usually press to the relief of the unfortunate, the stranger, and the defenseless man in your power, how will our claims multiply upon the mind! Sanguine imaginations conceived yet further motives for kindness; there were among us men so vain as to believe that, notwithstanding the separation between us, the different duties we now maintained, the prejudices of political zeal, and the animosity of civil war—yet still the conflict over, it might be remembered we once were brothers, and the more especially, as it was impossible, by the convention of Saratoga, that the generality of us should ever oppose America in arms again.

We were led into these delusive hopes by the very honorable treatment shown us by General Gates, by that we received from you, Mr. President, when you conducted us upon the march, and by that we afterwards found from the worthy member of the Court near you, who had the immediate command in this district upon our arrival, and to whom, most happily for us, the command is now again devolved.

The first symptom we discovered of any uncandid design, was the mode established for correcting errors and disturbances in the troops of convention; men were taken up, imprisoned and otherwise punished by the American troops, without any prior reference to their own officers. I very well know with how much slight and severe derision my senti-

ments have been treated on this subject, but I still insist, that after taking up men for faults, to have applied to the officers of the convention troops, in the first instance, for their punishment, would have been consonant to every principle of decorum and good policy, not meaning to deny, that upon any proof of partiality or connivance, or undue lenity, it then became a proper and indispensable duty of General Heath to take the distribution of justice into his own hands.<sup>10</sup>

The contrary maxim having been established, let us examine, in point of time, though the last in the proceedings, that burst of independency, scurrility and impiety, from Colonel Henley to the Quarter Master Sergeants at the Adjutant General's office. It is not without difficulty I can frame my mouth to read the words, as they were delivered upon oath, by that very respectable witness, Sergeant Fleming: "You rascals, etc., I'll make damnation fly out of you, and I will myself, one of these nights, go the rounds, and if I hear the least word or noise in your barracks, I'll pour shot amongst you, and make flames of hell jump out of ye, and turn your barracks inside out."

The Court will remember, that when this evidence was given, it rather excited laughter in some part of the audience, than any serious condemnation; this day it seems to make a very different impression—the minds of all around follow me while I contend, that expressions so wild, so unfit, so unprecedented, from the mouth of a gentleman, argue the most horrid passions boiling in the breast—the very enthusiasm of rage and malice. I defy any man to divest himself of that idea; it will attend the mind through the whole course of the proceedings, and cast a shocking glare over every subsequent transaction, of forethought intention, and bloody resolution.

<sup>10</sup> When the British troops first arrived at Cambridge, the officers wished to have the sole jurisdiction of all offenses committed by their own soldiers. The American commander admitted that the British officers might command and punish, for the purpose of internal order and obedience; but the exercise of his own command, and the enforcement of his own orders, when necessary, was a jurisdiction which the British officers must not expect to exercise. (Heath's Memoirs, 136.)

It is very material to observe, that this demonstration of Colonel Henley's mind was on or about the 16th of December, and it was no longer than till the 19th, before he confirmed, by an overt act, the principles he had professed. The stabbing of Corporal Reeves is proved by the evidence of Corporal Buchanan, Alexander Thomson, and Robert Steel. I shall quote indiscriminately from the testimony of these witnesses, because though one may recollect a few short passages or words more than another, there is not a shadow of contradiction, and I am confident there never was an instance where truth was laid before a Court by united evidence, more perspicuously.

It has been sworn, that on the morning of the 19th of December, Colonel Henley went to the barracks, on Prospect Hill, to release some British soldiers, who were prisoners; that having paraded them he read over their crimes, and coming to Reeves, told him he was confined for insulting a provincial officer. Reeves made answer, he was sorry for it; that he was in liquor, and would not have acted so had he known him to have been an officer.

I pause here to apply to the feelings of the Court, whether a more decent, proper and satisfactory excuse could have been conceived—what did it draw from the colonel? “Had it been me you served so, I would have run you through the body, you rascal.” Continue the comparison between the language of the colonel and the corporal: “Sir, I am no rascal, but a good soldier, and my officers know it; and I hope soon to be with General Howe, and fight for my king and country.” What did this produce from the colonel? “Damn your king and country,” and an order to the guard to run him through the body. Not a hand nor a heart could be found for the butchery. The colonel, enraged at the virtuous disobedience of his men, leaps from his horse, seizes a firelock with a fixed bayonet, and strikes at the man's heart. I call upon the gentleman of a learned profession near me, to inform the Court, when he sums up the evidence at the close of the trial, whether this act would not constitute malice pre-

[illegible]

GENT. MEN. when I say the perseverance of the corporal  
 ought rather to have pleased than provoked, I speak not  
 vaguely or romantically—I feel conscious proof of the truth:  
 and when I consider the actions of a Washington—when I  
 meet in the field a Gates, an Arnold, a General Glover, and  
 see them bravely facing death in support of their principles  
 —though I would shed my last blood upon a different con-  
 viction, I cannot withhold from the enemy the respect due to  
 the soldier; and, the immediate conflict over, he robs me of  
 my anger, and seizes my good will.

Gentlemen, in the different parts of the examination upon this fact, many questions have been asked by the prisoner, by the Judge Advocate, and by the Court, respecting the appearance of the prisoner's temper. Was he not in a mild mood? Did he not seem good-humored? Mild murder—good-humored murder—are phrases, I fancy, will not convey any clear meaning, till men change their ideas of that crime! We hear, it is true, sometimes, as a sort of proverb, to mark the utmost malignity and treachery, of a man smiling in your face while he cuts your throat; but, I believe such



smiles were never produced as excuses or extenuation of guilt. These questions, therefore, as I conceive, can have no tendency but to insinuate, that Colonel Henley's passion was entirely raised by the immediate provocation he received. I am ready to join issue upon this argument, and if the gentleman will rest his cause upon it, I will relinquish the proof established of Reeves' decency and consistency, and give him latitude for all the provocation he can suppose, short of personal assault, and the necessity of self-defense, which I am sure will not be pretended. Transpose, if he pleases, the time when Reeves is proved to have talked about King Hancock, and bring it back to the instant where it was attempted to be introduced as a substantial matter of provocation. He shall add insolence of gesture to abusive terms, and under all these fictitious circumstances, I will take the judgment of the Court, whether Colonel Henley, with full powers to imprison, and to punish by regular, decent, legal proceeding, has a shadow of justification for making himself, in his own person, party, judge and executioner.

From the 19th of December, the hands of Colonel Henley were imbrued in blood, till the 5th of January; but it evidently appears upon your proceedings, that the influence of his example, and the encouragement of his precepts, failed not to operate. As the first proof of it, I request the attention of the Court to the testimony of Colonel Lind, concerning the position of the sentry, which was such as must necessarily affect every passenger upon the public road, whenever he fired; and at the same time with a readiness to do mischief, so marked, that he took women for his objects, and would not give them time to turn round; he had orders so to do. Let the behavior of the next sentry, to whom Colonel Lind applied, concerning the ungentlemanlike behavior of the officer, with his confirmation of the whole proceeding, being according to order, be combined and compared, and it must universally strike common sense, that these were several parts of one determined plan to diffuse the seeds of discord and fury, in order afterwards to countenance a general havoc.

But, it may be said, the orders under which the continental troops acted, were not those of Colonel Henley, but of a superior. Will that be pleaded? Was the position of the sentries to kill or wound three or four passengers at a shot, the firing upon women, the refusal of redress to Colonel Lind, with all the indecent manner and language attending—will these circumstances be alleged to have proceeded from superior orders? If so, the excuse, indeed, becomes more alarming to us. It is not my part, at this time, to drop a consideration that would lead far on that subject. I shall only remark, how little the excuse would benefit Colonel Henley, who would still remain a cruel agent of—(I will use no improper terms) I will only say, a cruel agent of too hasty principles.

Colonel Henley has asked, whether complaints were made to him of the transactions of the 22nd. I believe there were not—but I dare say he will recollect the reason—other grievances of the most atrocious nature, abuse of officers, and assaults upon their lives, were preparing to be laid before General Heath; they were in number, and in time, to have filled up a much longer interval than between the 19th of December and the 8th of January, and not brought before this Court, because I understood it to be the intention of General Heath they should be separately inquired into. Enough has appeared to show how the system of persecution was preserved, and I come now to the transaction of the 8th of January.

Upon a general view of that black day, I am at a loss where first to carry your observation—the field was extensive, the scenes separate and successive, but evidently guided by one uniform design. In one place, a party on the march are stabbing and knocking out the brains of innocent spectators—at another, men, under pretense of a prisoner's escape, are glutting the same bloody purposes upon men not pretended to be concerned—in a third, Colonel Henley, in person, (the British officers at the same time being denied admittance) is running men through the body with his sword.

The first of these complicated horrors, in point of time, was

the attack first with the bayonet, and afterwards with the butt end of the firelock. I will read the evidence, without a comment, and I have only now to remark, it is rather a prepossession in favor of the continental troops, to suppose that such malicious treatment could proceed from a general sentiment; no body of people are so barbarous, unless instigated, and now is the time to call upon the learned gentleman near me, for another duty of his office, to expound to the Court the principles of law, respecting accessories and accomplices, and to say whether a man, by order, advice, example, or any other encouragement, influencing another to do a mischievous act, is not *particeps criminis*, at an hundred miles distance, as much as if present on the spot.

The stabbing of Wilson follows in course of the evidence. And it appears as little comment is necessary upon this, as upon the former action, further than to remark, that in this case, Colonel Henley is found to be accessory, not upon circumstantial, presumptive and argumentative, but upon positive proof, for it is sworn the action was done in his sight; that he made no attempt to prevent it, and though it be alleged, and even admitted, that he was at too great a distance, yet his giving no reprimand nor check to the soldiers, upon seeing the act committed, carries as direct a conviction of approbation and encouragement, as if he had given open applause.

The last act to mark the thirst of blood, is the stabbing of Corporal Hadley, and following Winks with threats of the same fate. It would be superfluous to expatiate upon the strength of the proofs, the concurrence of witnesses, that there was no provocation to this deliberation and wantonness of barbarity. The intention is so clear, in my opinion, against the probability of doubt, that I should not touch a moment upon it, were it not that a very grave application was made to the Court, by the most respectable authority in it, to consider of the nature of the wounds, as matters of the greatest importance, and question upon question was put to the surgeon, in every case, to find whether they were dangerous or

not is it possible for any gentleman can mean to measure the depth of the crime by the depth of the wound, and to argue that a man may thrust a weapon into another's breast without touching a mortal part? If this argument shall hold you ought to establish schools of anatomy for the education of young officers; the science of law should be allied to the skill of the fencing-master, to train the pupils to that liberty of touch, that can feel to a hair's breadth between death and life; a sort of fiddlestick dexterity, that can run divisions upon veins and arteries, and stop short in time and tude to the thousandth part of a second. Really, gentlemen, I am not willingly ludicrous upon this subject, but it is impossible to treat such an argument gravely. I dismiss it to my learned neighbor, with one more injunction to show the Court in law, that where a man passes a sword with violence at another's breast, whether the wound is a mere puncture, or goes to the hilt, the intentional guilt is the same. I have only one matter further to observe, upon the cross-questioning of the witnesses. It has perhaps been wished to insinuate, that at the time of these violent proceedings, there was cause of apprehension the armed troops might be surrounded and overcome. The troops themselves will hardly thank their friends for that idea! What, shall it be alleged that the militia of America, who, animated by their cause, have been self-taught the use of arms; that body, where every man is supposed himself to be a host—shall such soldiers be apprehensive of danger, from half their number of unarmed, mercenary, ministerial slaves, for such I know they think us! No, gentlemen, I reject with you so injurious a supposition; I give credit to the spirit and force of your militia—I do it seriously and upon experience, and it is upon that credit I found this proposition, that it being impossible the officers and soldiers should be induced to acts of violence, by any apprehension of resistance, it follows, by the fairest deduction, that either there was more prevalent malignity than ever appeared before in the human heart, or that the whole proceeded from direction, order, and a systematical plan.

Little more, I imagine, need be remarked, to apply the evidence to the several distinct terms I have used in the charge. That the whole tenor of Colonel Henley's conduct was heinously criminal, as an officer, will hardly be disputed, in a country where the principles of liberty have been so deeply studied. An army is not to be borne in a free state, but upon the principle of defense against an outward enemy, or the protection of the laws. The officer who makes himself the arbiter of the law, is guilty of the most shameful perversion of moral duty, and his impunity would scarcely be thought a very comfortable presage of the growing liberties of his country.

I have also said, the colonel's behavior was unbecoming a man. I will not trifle with the time or understanding of the Court, to enter into definitions upon this term, nor will I shock the ears of officers, nor even of the unfortunate person under trial, with so gross a term as the world in general apply to the act of assaulting a woman, a priest, or unarmed man, for they are all exactly in the same predicament. The sword drawn for such a purpose is no longer the badge and distinction of a gentleman; it is degraded with the implements of the assassin and hangman, and contracts a stain that can never be wiped away.

Gentlemen, I have now gone through the material parts of the proceedings; whether the offenses are resolved into vindictive resentment, or more deep design, or both, it must still appear wonderful that a general massacre did not ensue. By the patience and the discipline of the British soldiers, those horrors have been avoided; but whatever the escape may have been upon our part, it is tenfold more material on yours. We might, perhaps, for the struggles of the desperate are hard—but, perhaps, we might have been sacrificed to the last man—we should thus have paid a soldier's debt, which we have often risked; our fall would have been revenged, and our memories attended with pity and honor. But for America, the transactions would have remained a foul and indelible blot in the first page of her new history, nor

would any series of disavowal and penitence, nor ages of rectitude in government, purity in manners, inflexible faith, or the whole catalogue of public virtues, have redeemed her in the opinion of mankind.

Now, gentlemen, consider the words of the order under which you sit—reform the opinion of the court of inquiry, and say, whether it is the *honor* of Colonel Henley, or the honor of America, by which your minds ought to be impressed when they proceed to judgment in this cause. I close with that consideration, as far as I can impress it upon your breasts. I trust they are replete and pregnant with justice, honor, and duty to your profession; and above all, with that glorious whig principle, the words of which are become almost a general motto in this country, and the genuine substantial practice of which I shall ever revere in any country, a due sense of the general rights of mankind. I trust you have all these qualities, and in that persuasion, I cannot doubt what will be the issue of the cause.

*The Judge Advocate* declined making any observations on the evidence, until the witnesses in behalf of Colonel Henley had been examined. He renewed his objection to General Burgoyne's making any remarks upon the evidence, regarding it as improper, and a dangerous precedent.

*Colonel Henley* declined at this time to enter into a detail of his conduct as connected with the charge. He only requested that the witnesses in his behalf might be examined; and, if any remarks in his own vindication should seem necessary, he would submit them afterwards.

#### THE EVIDENCE AGAINST THE CHARGES.

*Major Swasey.* Was present with Colonel Henley, at the guard-house on Prospect Hill, when he wounded Corporal Reeves. Attended him there with a design of inquiring into the offenses of several British soldiers, who were confined in the guard-house. Previous to

this, had acquainted Colonel Henley with General Heath's orders, which were to release those prisoners whose crimes were trifling; those who had insulted any inhabitant and refused making any atonement for the affront, were to be sent on board a guard-ship. When we came to

the guard-house, the prisoners were ordered out and paraded. Examined the charges of each, and finding Buchanan and Reeves, who stood together, were confined (Buchanan for insulting and striking an inhabitant, Reeves for insulting an officer), we passed these two over as not subjects of releasement. After learning the other prisoners' offenses, Reeves was called upon to relate how he got into confinement. He mentioned the circumstances, and closed his narrative by repeating a low and very abusive expression, which he had made use of to the officer who confined him; on which I told him he was an impertinent rascal for treating any person with such language. He replied he was no more a rascal than I was; that he was a good soldier. On this I ordered silence, and threatened if he did not stop his impertinence I would lay him over the head with my whip. He kept on his talk, and Colonel Henley dismounted his horse, after bidding the fellow be silent to no purpose, took a firelock with a bayonet from one of the guard, and told Reeves if he said another word he would run him through. Reeves replied he might do it, if he pleased. Upon this Colonel Henley made a lunge at him, and pricked him in the breast. Reeves continuing his insolent language, Colonel Henley stepped back and made a motion to cock the firelock, and told him if he was not silent he would blow his brains out. One of the British soldiers finding Reeves was not to be silenced, begged of the colonel to return him to the guard-house. Buchanan and the other British soldiers

begged the colonel not to take notice of the affair, for Reeves was drunk. On this Reeves damned them, and said he was not drunk. He was ordered into the guard-house. Do not remember that much swearing passed, nor can I recollect the words of insolence used by Reeves. After Colonel Henley had pricked him, Reeves said he was a good soldier, and he would fight for his king and country as long as he had breath, and hoped that he should soon be with General Howe, that he might seek revenge. Colonel Henley's intention in making the pass at Reeves was only to silence him; for had the colonel extended his arm, he might have run him through with the bayonet.

*General Burgoyne.* Did you hear Colonel Henley order any of the guard to run Reeves through the body before he dismounted from his horse? I did not, but he might have done it. In what position was Colonel Henley when he made the pass? He had his right hand on the butt of the firelock, and the left grasping the stock. Did you hear Reeves apologize to Colonel Henley for insulting the officer? He said he did not know him to be an officer. By what rule do you judge of insolence of language when you do not remember the words? By the manner. Did Reeves throw out any reflections upon America, or the persons concerned in the cause of it? He did not that I heard. Did you consider Reeves's saying he would fight for his king and country as part of the insolence you mention? I did not; Colonel Henley in reply damned General Howe, or



his king and country, and told him nobody blamed him for fighting in the cause he had engaged in. Did you see any resistance made, or any mark of disobedience on the part of Reeves to the colonel's orders, except his not being silent? There was no other order given; Reeves made no open resistance. In going down to the guard-house, did Colonel Henley express satisfaction at having it in his power to release the British prisoners? He did.

*Silas Wild.* Am captain in the militia. Had command of the guard on 19th December. Colonel Henley and Major Swasey came to the guard-house and inquired what number of persons I had in custody, and ordered them paraded. They were accordingly drawn up in a single line; Reeves was on the right, and Buchanan next to him. The colonel mildly asked the prisoners why they would get into difficulties? I handed the charges against them to Major Swasey, and as he read over their names and offenses, the colonel spoke to each one upon the subject of his confinement. When he came to Reeves, he observed to him that he was the lad who abused an officer down in town. Reeves said he did not know him to be an officer at the time. Major Swasey told him that if he had been the officer, he should have taken his satisfaction on the spot. Colonel Henley then told Reeves he was a rascal. Reeves replied, "I am no rascal, but a true Briton, and by God I will stand up for my king and country till I die." The colonel told him that he was a good fellow to stand up for his king and country, that

he did not blame him, but he must be silent. Reeves kept on talking; the colonel ordered silence, and turned to Buchanan. The major went on to read his crime, and Buchanan was making an excuse for his conduct. Reeves continued talking and swearing, and turned round to Buchanan and said, "Damn you, why don't you stand up for your king and country?" Buchanan desired him to be quiet. Reeves answered, "God damn them all, I'll stand up for my king and country while I have life; if I had my arms I would soon be with General Howe, and be revenged on them." Upon this, Colonel Henley got from his horse, and took a gun from one of the guard with a fixed bayonet, and brought it up towards Reeves' breast, and made a push at him, and said, "You rascal, if you don't hold your tongue, I will run the bayonet through you." Reeves stepped one foot back, and said he would stand up for his king and country, "and if you have a mind to kill me you may." The colonel brought up the piece again, and Reeves repeating the same words, the colonel exclaimed, "God damn your king and country; if you do not hold your tongue, I will run you through the body." Buchanan then took hold of the musket, and Colonel Henley bid him keep his distance. Finding Reeves was not to be quieted, I desired the colonel to recommit him, and he was remanded to the guard-house. After he was in the guard-house, he looked out of the window, and kept talking and swearing while Colonel Henley was addressing the other prisoners. Supposed Colonel Henley,

in the pass he made at Reeves, intended only to silence him. The colonel spake very mildly till Reeves said, "God damn them all." He dismissed the rest of the prisoners with a mild reproof. Colonel Henley did all he could to satisfy the prisoners before he dismissed them. He mildly cautioned them, and told Buchanan he would release him after he had wrote to the inhabitant who had been abused. If Reeves had not stepped back, do no think the bayonet would have gone into his body.

*General Burgoyne.* Is it usual, in the American service, to silence men by the sword and bayonet? No, it is not; but when the temper is raised a man will do that which at another time he would not. Did not hear Colonel Henley order any of the guard to run Reeves through the body, before he got from his horse.

*Several witnesses* testified as to the occurrence at the guard-house, that the language and conduct of Reeves was indecent and insulting to Colonel Henley. Reeves was then in confinement for using language to a Continental officer, of an indecent character.

*Colonel Gerish.* Belong to the militia. On the evening of January 7th, a messenger came to me at Winter Hill, where my regiment is posted, and acquainted me that a sentry had been knocked down on his post, and his gun taken from him. In consequence, I ordered the regiment out, and detached two hundred men, with two captains, as a reinforcement to the guard at the French lines on Prospect Hill, with orders to march silently and

surround the first row of barracks, where I supposed the gun was carried in. I accompanied the detachment. The party was in two divisions, one under Captain Huse, the other under Captain Kimball. Left the party under Captain Huse in front of the first row of barracks, and then Captain Kimball (who had mistaken my first orders, and got to a wrong situation), to join Captain Huse; while Captain Kimball marched to make the junction, I was left a little behind in front of the second row of barracks. A British soldier came out and said to me, "Damn you, what do you come here for? We have done you no hurt in these barracks; we have got arms and we will shoot you." Thought the sentry's gun might be in that barrack, and called for a sergeant and a dozen men. They came up; then the British soldiers came to the door of the barrack and presented a weapon out (I thought it had been a musket, though I afterwards found it had only been a club), and said, "God damn you, we'll shoot ye." Ordered my small party to fire upon them, but upon the party's cocking, re-called the order, as the British soldiers in the room might not all be guilty, and some of my own men might be endangered, who were in the rear of the barrack. We approached close to the door, and found that they were not guns which the soldiers in the room had in their hands. One of them, as we approached, made a stroke at us with a stick, but did not hit either of us; as he was making another pass I struck him down, and we entered the barrack, and took five or six of those

in the room, and sent them off to the main guard. Got a candle and searched the room; found no arms, but a number of hickory sticks, shorter and stouter than walking sticks. When the search was over, one of the British soldiers caught at the candle and put it out, and followed us to the other barrack, where he was insolent and saucy, and I thought proper to send him to the guard-house. Gave orders to the British soldiers that they should not leave the barracks till the barracks were searched, telling them they should not be molested by my men. Searched the barracks where I supposed the gun was carried in. They were loth the barracks should be searched, and refused giving me any direct answers; they were insolent and kept damning of us. Several of them called us damned rebels and yankees several times; this gave me strong reasons of suspicion that the gun was secreted among them, and I therefore thought proper to send the greater part of those in that room to the main guard. Went on, and searched several rooms in the same row of barracks, and met with no opposition or insult. Finding the search fruitless, returned with my detachment to Winter Hill, except a party I left to reinforce the guard at the French lines.

*Colonel Henley.* Did you receive any orders from me whatever, that evening? No, I made report of the transaction to you next morning.

*General Burgoyne.* Were you distinguished from the men by any mark that could designate you to be an officer of rank? I

had on a blanket-coat, and sword slung over it, with a fire-lock in my hand, and it was dark.

*Colonel Eleazer Brooks.* On morning of January 8, made a report to Colonel Henley, in the following words: "Sir, before I make my report as an officer of the day (yesterday), I thought it my duty to inform you that one of your sentries was last night knocked down, and his gun taken from him; that Colonel Gerish, in attempting to recover the gun, was resisted with clubs, etc. That about twenty of the British soldiers were confined for this affair. I am this moment informed that two of our men were killed last night; whether it be true or not, I can't say."

*Colonel Henley.* Had you orders to get your regiment under arms? The regiment were, I believe, got under arms immediately, and soon after dismissed; but I was not with them.

*Captain Caleb Brooks.* On January 8 was captain of the guard on Prospect Hill, and had in custody twenty-nine British soldiers. About 11 o'clock, Colonel Henley and Major Swasey came up to the guard-house, and after some inquiries, and my reporting that everything was very quiet, Colonel Henley told me that a reinforcement was coming up, and he thought it would be best to take the prisoners out of the guard-house, and send them to Cambridge, where an inquiry could best be made into their crimes. We went into the guard-house together, and presently the detachment came into the citadel, and formed about four rods

from the guard-house. Saw a large number of British soldiers collecting near a corner of the guard-house. Went, with Colonel Henley's orders, to bid them disperse and retire to their barracks; he ordered them two or three times; finding they would not obey him, he called twelve men from the detachment. After some time the twelve men moved from the party, upon which the British soldiers gave a shout and dispersed, going off towards their barracks. Immediately on this, a man came up and told Colonel Henley that a prisoner had been rescued from him by the British soldiers. Colonel Henley said he would take the command himself; and then marched the detachment out of the citadel, and paraded them in the rear of the barracks in the fort. Know of no transactions while the detachment were in the fort, for as captain of the main guard I could not quit my post at such a time. Near three hundred British soldiers were collecting when they dispersed. No insult was offered to Colonel Henley by the British soldiers, but they were laughing and jeering at the guard; some of them cried out Yankees; I can't be particular in their expressions.

*General Burgoyne.* Was there any appearance of an assault on the part of the British soldiers? No; they appeared to me rather with a view of insulting than assaulting the guard; they pointed at and laughed at the guard; they were talking, but I did not hear their expressions; there was a breastwork between the British soldiers and the detachment, over which they were

looking at the detachment. Had the British soldiers any weapons in their hands? Not that I saw.

*Major Swasey.* On the morning of January 8 was accompanying Colonel Henley to Prospect Hill. At the bridge on the road to Prospect Hill, the sentry was examining a pass showed him by Corporal Buchanan. Colonel Henley suspecting the pass might be forged, ordered Buchanan to show it to him; with much reluctance he gave it to Colonel Henley; the name of another man inserted in it. In consequence Colonel Henley ordered a file of men to take charge of him. As there had been frequent rescues before, Colonel Henley ordered the guard, in case any British soldiers should attempt to rescue him out of their hands, to fire upon them; then went on with Colonel Henley to the guard-house on Prospect Hill. Soon after we got upon the hill, a detachment, which had been ordered up to take charge of some prisoners in the main guard, arrived; after the detachment had paraded near the guard-house, a large body of British soldiers appeared near the breast-work, who were ordered to their barracks by an officer, and then by Colonel Henley; they appeared to move slowly off; stepped up to the breast-work, and observed Buchanan coming up with the guard; the guard had got into a crowd of British soldiers; observed a British soldier hold of the skirts of the coat of one of the guard, and heard some amongst the crowd cry out, "Run, damn you, run," and saw Buchanan running through the

crowd of the British soldiers; one of the guard pursuing him with a charged bayonet, was intercepted by the crowd, and I saw no more of Buchanan. Immediately Colonel Henley ordered the whole of the detachment to march out of the fort, and we went out of the fort together, and Colonel Henley asked me what measures he should take to recover Buchanan? Observed to him the best way would be to acquaint the British commanding officer of the day of it, and did not doubt he would give Buchanan up. Colonel Henley then desired me to wait on the commanding officer, and acquaint him with the matter; accordingly waited on Major Foster, of the 21st regiment, and on acquainting him with the matter, the major told me he would send for the adjutant of the regiment and order him confined, and report the matter to the brigadier. In six or seven minutes I returned to Colonel Henley, and reported Major Foster's answer, with which he seemed perfectly satisfied. About 150 soldiers were assembled at the time Buchanan was rescued, within a circle of 100 yards.

*James Hartwell.* Was at the guard-house on Prospect Hill, on the forenoon of January 8, when Colonel Henley and Major Swasey rode up; soon after a detachment came up and were paraded near the guard-house; a number of British soldiers made their appearance outside the breast-work, near the guard-house; orders were repeatedly given to them by the captain of the guard and by Colonel Henley to disperse, which they paid

little regard to. There were about one hundred at the breast-work, and more were coming up; at this time saw two or three of our men armed, coming through the British soldiers. Colonel Henley called out for a dozen men, upon which the British soldiers gave a shout and moved towards the barracks, and on their way rushed between the two or three armed men before mentioned, and there was a scuffle among them as they cleared away; suppose a British soldier, by his clapping his hand near his hip, was wounded. Colonel Henley soon marched out with the detachment, and paraded them in the rear of the barracks; I followed and stood in the rear of the guard near the center. As soon as the detachment halted, the British soldiers gathered round in front and rear of the detachment, to the amount of upwards of two hundred. Colonel Henley ordered twelve men on the right to prime and load, and then wheeled them to the left so as to form an angle. Colonel Henley then turned towards the British soldiers, and said that he had had one prisoner rescued, and if they offered to rescue any more, he would order his guard to fire upon them. Colonel Henley asked for Major Swasey, and seeing Colonel Gerish on horseback, he stepped up to him; two or three British soldiers followed him, and stood at two or three yards distance, listening to what was said by Colonel Henley and Colonel Gerish. Colonel Henley ordered a division from the left of the detachment to go into the citadel and bring out some prisoners; they marched

off accordingly, and were about one-fourth of the whole detachment. Colonel Henley disposed his men to receive the prisoners which might be brought; by this time the British soldiers had collected in such numbers, that the colonel had hardly room to pass in front of his guard. Colonel Henley then addressed the British soldiers, and ordered them to disperse and go to their barracks. Some few turned round; Colonel Henley repeated his orders, and said, "Begone to your barracks, every one of you;" some others then turned round and moved slowly. Colonel Henley, on their moving slowly, cried, "God damn you, why don't you move," and made a lunge with his sword at a British soldier, which I imagine struck him, as I observed the sword was bent, and saw the colonel endeavor to straighten it. They then moved off, and the men returned from the guard-house with the British prisoners, and the whole detachment marched off the hill with them. Did not hear any British soldier say anything to Colonel Henley during the time. There was a buzzing amongst them, but I can't repeat any expression they used. The British soldiers had no weapons in their hands. The colonel might have taken a single person; it might have been dangerous taking more. After he made the lunge mentioned, he turned round and walked in the front of his guard towards the right, and spoke to a British soldier, who was walking very slowly in front of the guard, and bid him go along immediately; he repeated the order; the soldier did not in the

least quicken his pace; Colonel Henley followed him a little way, and then turned round; the British soldier attempted to pass the sergeant, who stood on the right of the guard; the sergeant pushed him off the bank.

*Asa Peirce.* Belong to the militia. On January 8, in the forenoon, orders came to the sergeant of our guard, to furnish a file of men and a corporal to take charge of a British soldier, of which I was one; we took him at the bridge, just below the provision house. Colonel Henley, when we took charge of the prisoner, was by, and gave us orders if any man attempted to rescue him to fire upon them. We marched on with him (his name was Buchanan); he told us he had done nothing more than having a pass that was not his own, that he should not be punished, and that one of us would be sufficient to guard him. Just as we got within the works behind the barracks, where there was a considerable number of British soldiers collected, a British soldier came up to us upon the run; told him to keep off; he muttered something and told me if I did not mind he would take my firelock from me. Our corporal told him if he did not mind how he talked he would take care of him. On this he stepped aside, and walked along with us, talking with Buchanan upon the subject of his confinement; as we went along we came up to a crowd of British soldiers, I should think three or four hundred of them; our corporal ordered them to make way, which they refused to do, and stood so thick together that



we could hardly tell which the prisoner was. The prisoner stepped out and another British soldier stepped in, took hold of Buchanan's arm, and placed himself between me and Buchanan, who went off with the crowd; our corporal turning round and seeing Buchanan gone, stepped in among the British soldiers to recover Buchanan. The same British soldier who had taken hold of Buchanan's arm, took hold of the corporal and stopped him; upon this I brought my piece down and pricked the soldier who had hold of the corporal, between the hip and the ribs. The soldier then let go the corporal's arm, and we marched on to the main guard without our prisoner.

*General Burgoyne.* Did the British soldiers refuse, by words or actions, to make way for the guard to pass? By actions; I mean they did not move out of the way; they talked, but I don't recollect what they said. After Buchanan had escaped from the guard, did the British soldiers show any marks of triumph? Yes, they laughed and huzzaed a good deal. Do you know the name of the person whom you pricked? I do not. Do you think you run the British soldier into the body? I imagine I did, for I pushed with a good will, and he cried out, "God damn you."

*Several witnesses* testified that the American sentries had been frequently knocked down on their posts by the prisoners; and soldiers who were arrested were frequently rescued. It was common for the British soldiers

to use every possible term of insult towards the American soldiers while on duty, and sometimes even to the officers. On one occasion an American lieutenant made known to the British officers the circumstances of an insult and rescue, of a very aggravated character. The guilty party was afterwards tried by a British regimental court martial, and sentenced to receive fifty lashes; but the sentence was remitted, and the man set at liberty, and no satisfaction was given to the American officer who had made complaint. The standing orders from Colonel Henley to the main guard (dated December 23, 1778), were as follows: "The guards are to be vigilant and alert, and do their utmost to prevent disorder, and keep peace, ever attentive to the security of the camp. No officer or soldier shall be allowed to stroll from the guards. No offence to be given to any officer or soldier of General Burgoyne's army, nor is any to be received from them by the officers and soldiers of the United States of America; but they are to take up and confine any that offer the least abuse, and report them to the commanding officer. The officer commanding the guard will give orders to the sentries, that they are to defend barracks, fences, and all property whatsoever belonging to the army, or to any of the inhabitants of the United States. When any insurrection of the prisoners shall appear to be of consequence, the commanding officer at Cambridge, is to have due notice thereof."



## IN REBUTTAL.

*Captain England.* Am an officer of the grenadiers; August, 1774, was member of a general court martial, at New York, whereof the late Brigadier General Nesbitt was president; Captain Adye, of the royal artillery was judge advocate to the court martial; and the Rev. Mr. Newburg, chaplain to the 18th regiment was tried by the court martial for various offences, and prosecuted by Captain Chapman, of the same regiment, and in the name of the regiment; after the witnesses against and for the prisoner were examined, the prisoner made a defense, to which Captain Chapman, the prosecutor, made a reply, in which he commented and remarked upon the prisoner's evidence and defense, having being allowed a certain time to prepare his reply.

*Captain Willoe.* Belong to the king's regiment. Lieutenant Molesworth, of the 52nd regi-

ment, was tried by a general court martial, of which I was a member, at Quebec, in the year 1769. After the prisoner had made his defense, Lieutenant Williamson, who prosecuted, replied and remarked upon the evidence produced by Mr. Molesworth.

*Lieutenant Bibby.* Am of the 24th regiment. In the trial of Captain Garsten, of the 17th dragoons, in Dublin, in the year 1771, Major Birch appeared as prosecutor, and it being objected at first by the prisoner, that the prosecutor should have the assistance of counsel, it was the opinion of the court, that both the prisoner and prosecutor should, if they thought proper, have counsel to prompt and assist them, but not to plead; the judge advocate upon this trial was an attorney; Major Birch acted through the whole course of trial as prosecutor.

*The Judge Advocate.* Mr. President, and Gentlemen of the Court: This, in common with all courts of record, undoubtedly has power to direct its own proceeding, subject to the articles of war. I do not ground my objection on anything in those articles, prohibitory of the claim I oppose, but on the customs which prevail in the American army and the supposed duty of the Judge Advocate. Those articles constitute a Judge Advocate, who, although enjoined to prosecute in behalf of the government, hath always been considered in our armies bound to assist the prisoner, not only in points of law, but by an impartial representation of facts. The whole evidence in the trial is taken in writing, subject to the inspection of the Court. You cannot, therefore, gentlemen, be deceived by sophistry, or misled by rhetoric. Pleadings for

this reason are unnecessary, except on a point of law, for which the Judge Advocate is presumed to be competent, and unbiassed by the tenure of his office.

I do not oppose these precedents because they are British; had they been from Portugal or Turkey, and been pertinent and reasonable, they ought to influence your determination; although the instance mentioned by Lieutenant Bibby, is rather against the general, considered in the latitude to which he aims to extend his claim. The articles of war which govern the British army, are extracted from the Roman code of civil law; and ours are nearly the same with those adopted by the British mutiny act.

The trials by courts martial are designed to be simple, speedy, and decisive. The soldier's duty is clearly prescribed, and the punishment for neglect of it plainly ascertained, by the articles which give jurisdiction to the Court that are to inquire into and punish delinquency. The Judge Advocate acts in the double capacity of prosecutor and counsel to the prisoner, which, those who are acquainted with the proceedings of military courts, will allow not to be inconsistent duties. The office of Judge Advocate has been considered by some in an army, the same as that of Attorney General in the courts of criminal jurisdiction at common law, but I can safely appeal to your decision, gentlemen, if I am wrong as to the duty of that officer in our army, as I have laid it down.

The altercations of the bar in the courts of common law arise from a combination of rights in free society, which are unknown in an army. A man when he commences a soldier, makes a temporary relinquishment of the privileges of a citizen. If a prosecutor, (and in this case a very able one) is admitted in addition to the Judge Advocate, surely it would be unreasonable to deny counsel in defense of the prisoner—and then consider, gentlemen, what would be the consequence. Every man brought before a court martial would be entitled to the same indulgence. All the subtleties and delays which prevail at common law would be introduced into courts martial, infinitely to the public disservice, under the circum-

stances which armies, *durante bello* especially, ought to be maintained and governed. I submit my objection to the opinion of the Court.

The Court was ordered to be cleared, and after debate, announced their opinion, that *General Burgoyne* should have the liberty of remarking upon the evidence offered by *Colonel Henley*, and the *Judge Advocate* was directed to acquaint the General with this determination.

*January 24.*

The COURT now called on *Colonel Henley* to close his defense.

*Colonel Henley.* Mr. President, and Gentlemen of the Court: I have particular reasons, and in my own apprehension very sufficient, for declining to say a single word in answer to the illiberal abuse thrown upon me, and the palpable dishonor done to my country, by General Burgoyne, in this court. It is, Mr. President, a new thing under the sun, and taken in all its circumstances, totally without example. The Judge Advocate will sum up the evidence with ability and impartiality. Such is my consciousness of having done nothing through this whole affair, but what the honor and safety of my country absolutely required, that I shall rest entirely satisfied with your decision; being at the same time fully persuaded, that the impartial public, at whose bar I stand, will join with you in acquitting me from all the injurious and illiberal charges of General Burgoyne, and that they will vindicate me for that humanity, characteristic of an American officer, and with which the officers and soldiers of General Burgoyne's late army have been treated, while I was honored with the command of the guards.

*General Burgoyne.* Mr. President, and Gentlemen of the Court: On the day of your last adjournment, the Judge Advocate notified me, that the Court had agreed I should reply to Colonel Henley's defense, but had directed that the reply should be made immediately after the colonel closed; he added, that all interested are to attend and come prepared.

I did not judge, from the manner in which the Court have treated me hitherto, that in any instance they meant me uncandidly. I therefore suppose, that when they made it a point I should come prepared to answer, off hand, arguments which might have been a month in framing, they saw the evidence before them in so strong a view, that no argument on my part, could be necessary. Did I want further confidence in this opinion, I could not fail of deriving it, in a most ample degree, from the conduct of the prisoner, who has been just now constrained, by his situation, to substitute invective for argument, and to recriminate, where it was impossible to defend. Under the sanction of the Court, and the circumstances of the time, this *candid* gentleman has ventured to make use of terms to which my ears have not been accustomed; but he is mistaken if he thinks to draw from me an intemperate reply; on the contrary, as conductor of this prosecution, I have rather to thank him for his assistance. After having furnished me, during the whole course of what is called his defense, with evidence to corroborate the facts alleged against him, he at last steps forth a volunteer witness (the most undeniable one sure that ever came before a court) to prove the heat of his own temper, which is of itself a material part of his accusation. This remark is the only return I shall at present address to the prisoner, for the expressions he has used; but I cannot quit the subject, without seriously appealing to the recollection of the Court, whether, from the outset, I did not, in the most positive terms, disavow all personal resentment, and whether the strongest language which the course of my duty, as prosecutor, led me to use, did not invariably arise from the facts, and apply to the offense more than to the offender. I make the same appeal against the accusation of "having done palpable dishonor to the country in this court." Is it to do palpable dishonor to a country to appeal to the justice of it? It puzzles my intellects to conceive the meaning of this last expression; but indeed, sir, I want no other vindication than your silence, to prove that I have not abused the latitude I have possessed in either case;

for would you, Mr. President, or any member of the court, have suffered a prosecutor to insult an unhappy man, under trial, with illiberal abuse? Still less would you have suffered the country to be treated opprobiously. It is for Colonel Henley to reconcile with his respect to the Court, charges, which, if founded, would be a general reflection upon their conduct.

I understand great expectation has been raised of a very elaborate defense on the part of Colonel Henley, and acknowledge I myself little thought he would throw up his cause quite so confessedly, though I was always sure, that neither ingenuity nor sophistry, nor all the talents which the ablest counsel could assist him with, would be sufficient to affect the great leading proposition upon which I ground myself, as upon an immovable rock, namely, that the proofs on the part of the prosecution do not only remain unimpeached, but are augmented and enforced in the most material parts, by the evidence produced in the defense.

Gentlemen, a very few observations will suffice to justify this assertion. The first part of the charge which the prisoner brings evidence to oppose, is that concerning Corporal Reeves, on the 19th of December, and the first evidence is Major Swasey, an officer of rank and trust in your army, warm in the present unhappy contest, and naturally impressed with inclinations to favor his countryman, his brother officer and friend. Yet, with all these circumstances to bias (such is the force of truth and honor upon that gentleman's mind) he proves to be the strongest witness of the whole trial, on the side of the prosecution.

The beginning of this gentleman's relation is a confirmation of all the leading circumstances mentioned by the other witnesses. The first new matter of evidence is, that when he, the major, told Reeves he was a rascal, the corporal made a reply to him (not to Colonel Henley) he was no more a rascal than he was, at which he raised his whip, and told him, if he did not hold his impertinence, he would strike him. One

circumstance of this part of the evidence cannot pass observation, namely, that the poor corporal had two aggressors to answer instead of one. The word, and the menaces attending that word, came to his ears on both sides. Another circumstance is equally observable, and it stands upon your proceedings as a record of honor to Major Swasey, that his warmth of temper was moved at the recital of Reeves' offense, to give a sharp rebuke, and to use an opprobrious expression, but the idea of chastisement went no further than a stroke with a riding whip. Happy had it been for the prisoner had he followed so temperate an example.

The major's narrative proceeds in respect to Colonel Henley's dismounting, catching the firelock and stabbing Reeves, in conformity to all the witnesses for the prosecution, except that the circumstance of ordering one of the guard to run the corporal through is omitted, and his recollection being called to that circumstance, by a question in the cross-examination, he replies, "he did not hear him" (but with a candor and tenderness to his oath which never departs from him) he adds, "he might have given such an order and I did not hear it."

The foregoing evidence, therefore, is not shaken by any contradiction, but it is immediately after augmented by an entire new circumstance, namely, that after the first thrust, upon Reeves' still talking to Colonel Henley, he stepped back and made a motion to cock the firelock, and added he would blow his brains out, or words to that effect, when a British soldier took hold of the firelock and threw it up. I request the Court to take notice, that Major Swasey, uncalled upon by any leading question, remembers that act which saved Reeves from a second thrust, accompanied perhaps with fire. Can any doubt be now entertained of Colonel Henley's resolution? I think I have proof they were obvious to Major Swasey, at the time, by the very remarkable part of the evidence, "I then got off my horse," (a conduct worthy his character, expressive of his apprehensions and his humanity) "and begged Colonel Henley to send Reeves to the guard-

house." The other petitioners joined their intercession, and the man's life at last was saved.

It may perhaps be objected to this argument, that Major Swasey, upon being asked, in the cross-examination, whether he thought Colonel Henley made a thrust with an intent to injure or to silence the corporal, answers, to silence him; for if he had pushed his arm forward, he would have run him through. And in another place he makes use of the words, "to still him."

I scorn to insinuate, that a witness of the major's description meant to keep a salvo upon his mind, and purposely to use any term of ambiguity. I upon my honor believe, that when the major makes use of the words, to silence or to still, he means to terrify him till he held his tongue; but I beg leave to observe, that great difference might be made in the major's opinion, between the time the act was committed, and the time his sentiments are asked in court. The conversation with Colonel Henley, the belief of his other friends, and the candor of his own heart now persuaded him, that the colonel's intents were innocent. His own interference and intercession mark his doubts, at least at the time, and did they not, the Court will hold themselves bound to act upon their own opinion, formed upon combination and comparison of circumstances, and not upon the opinion of another, which is no evidence. They will also recollect, that this opinion goes only to the first stab, and is formed upon its not being forcible. It does not appear that the major formed any opinion, nor indeed could he, upon what force would have been the second stab of a man rising in a passion, had it not been prevented by seizing the bayonet and his intercession.

It is not necessary to trouble the Court with a review of any other parts of this upright evidence, which is long. The answers to the cross questions in general go to a full confirmation of the narrative, with this one addition and aggravation of Colonel Henley's conduct, that the major thinks the language of Reeves was addressed more to himself than the colonel, till after the stab.

2



Captain Wild, of the militia, is the next witness, and confirms the excuse of Reeves, and every other circumstance in the beginning of the affair, as stated by the former witnesses, and by Major Swasey, except the small difference that Colonel Henley, not Major Swasey, first made use of the word rascal. He mentions afterwards another new circumstance, that the prior witness had forgot, namely, Reeves, turning to Buchanan, and damning him, saying, "Why don't you stand up for your king and country?" Buchanan desired him to be still. Reeves replied, "God damn them all. I'll stand up for my king and country while I have life; if I had arms and ammunition I would soon be with General Howe and be revenged." He afterwards relates, in a very circumstantial manner, making the push at Reeves; Reeves stepped back one foot, but the bayonet pricked him; and the lifting up the piece a second time, and Buchanan seizing it and turning it aside.

Upon the cross-questioning, the witness gives nearly the same answers as Major Swasey, upon the matter of opinion of Colonel Henley's intention, and of not hearing Colonel Henley order a man of the guard to run Reeves through, before he dismounted, but repeating the first, the manner in which this gentleman expresses himself is remarkable: "I believe you only meant to silence him, as you spoke mildly, till Reeves said, 'God damn them all.' " That Captain Wild thought the colonel was in a passion afterwards, is clear from his answer to the question, whether it is a rule in the continental service, to silence men by the bayonet or sword; when he replied, "it is not, but when a man's temper is raised he is apt to do things he would not at other times."

I cannot quit this evidence, without classing it with Major Swasey's, and while it does honor to the witness, in point of truth and candor, it is to be remarked, that it is also exceedingly circumstantial, new and leading circumstances are remembered, none forgot, except the order to the guard, and the Court will see, by and by, why I so solicit their attention to these remarks.

The witnesses that follow are indeed of a very different sort; the Court will recollect the appearance of the first, Corporal Dean; he told his story very fluently, with that remarkable new incident of provocation in Corporal Reeves, who, he swears positively, said to Colonel Henley, "if I am a rascal, you are a damned rascal;" but after all this fluency and recollection, upon his cross-questioning, neither encouragement, nor admonition, nor patience, nor leading question, could draw an answer that any man could understand; and particularly the Court will remember his silence and his countenance, when pressed to declare his sentiments upon the obligation of an oath; I will not be so uncandid as positively to pronounce upon guilt from appearance, but it is the great value of parol evidence, that a Court may see the manner, and thence form a judgment upon the credibility of a witness. From what probable cause did the confusion of this man arise? It was not the awe of the Court; and it is fair to suppose it is a weakness of understanding; consequently he was a fit subject to be tutored, and if not wilfully perjured, led into a belief of more than he actually saw and heard.

He is followed by a string of the best-instructed young men that ever related a story in public—Elijah Horton, Silas Moss, James Brazer, Wedsworth Horton, and John Beny, most of them lads of sixteen years of age.

I need not recall to the Court the precision of the recital of these youths, nor the manner of their delivery. It was the exact tone and repetition of a fable at school, and so well was the lesson got by heart, that there was not a single difference in the arrangement, and scarce a syllable misplaced. But it is not only in the similitude of memory these youth are extraordinary, they are equally remarkable in the precision of their forgetfulness, with a recollection so acute, as to repeat verbatim a long story of Corporal Reeves, and the marked expression *damned rascal* to Colonel Henley; not one syllable was heard by any British witness, nor by those attentive, circumstantial, respectable witnesses Major Swasey and Captain Wild; not one of the whole five can remember a word

or circumstance respecting the colonel's dancing Reeves' king and country, attempting a second pass, and being prevented by Buchanan's seizing the firelock: to all of which all the other witnesses have positively sworn. Upon the whole, I concluded that no contradiction of witnesses could invalidate their testimony more than such an exact conformity in circumstances, sentences and words, when it was for the purpose of five persons to recollect the same story, and with equal conformity in the want of recollection in circumstances, that must indispensably have been as manifest to their observation, as to that of any other witness.

I owe an apology to the Court for having dwelt upon the invalidation of these witnesses longer than was necessary: for the weakness of their instructor, whoever he has been, has counteracted his wickedness, and it would do no harm to this prosecution, to give a full scope to their testimony, because there is no maxim in law more clearly laid down, and more generally understood, than that no affront by words or gestures only is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another.

The next matter to which the witnesses in defense have gone, is the stabbing of Traggot on the 8th of January, and there likewise their testimony has served to aggravate, instead of contradicting the charge. Sergeant Kettle, in particular, expressly says, he thought the soldiers deserved stabbing, as they would not get out of the way; and in another place, that laughing and sneering as it were (which he acknowledges was the only provocation) was sufficient to justify stabbing.

I shall give the Court no trouble upon the evidence brought to prove the provocation of a rescue; the escape of Buchanan was not heard without a smile in court, nor can it be seriously commented on, except in the answer of Asa Pierce, a lad of sixteen, to the Judge Advocate, who asked him whether he thought he run the British soldier into the body: "I believe I did," says he, triumphantly, "I pushed as hard as I could.

and with a good will; he cried out, 'God damn you.' '' This is but one of several instances that might be selected from these proceedings, to show the degree of rancor to which the minds of the American soldiers were excited. Children that had scarcely lost the taste of their mother's milk, acquired a thirst for blood, among those from whom they took the example; the colonel thinks a man deserves death if he looks sulky; the sergeant thinks the same if he smiles. Good God! What is the value of a British life, at such a time, in such hands?

In a former part of these proceedings, I expressed my desire that the Judge Advocate would explain to the Court the established principles of law, respecting absent persons being accessories to offenses which they have in any manner influenced, and almost every sentence that has fallen from the last witness upon the affair of Traggot, is a new call to press the consideration of those principles. I am persuaded the learned gentleman will not contradict me, in the few more leading propositions I shall add to those I mentioned on a former occasion: First, "any man advising, influencing, or countenancing another, be it by words, reward or example, to do mischief, is an accessory at a distance. Secondly: Though mischief is committed by different means than those proposed between instigator and perpetrator; for instance, A persuades B to poison C, he kills him by any other means, A is accessory. Thirdly: When the principal goes beyond the term of solicitation, if in the event the mischief committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be accessory.

Apply the above maxims—Colonel Henley directs his men only to knock down any British soldier, who they think looks sulky at them (you have seen that he often thought a much greater punishment was due for such a crime as a sulky look) but we will suppose, he only orders them to knock a man down, or to prick him or still him, and a soldier fires down a common road, sticks his bayonet into one, and strikes at the brains of another with the butt of his firelock, Colonel Hen-

ley is a party to the mischief, whatever it may be, and upon a continuation of the principle laid down before, "the advice, or instigation or influence, are flagitious on the part of A—the events falling out beyond his original intention, are in the ordinary course of things the probable consequence of what B does under the influence, and at the instigation of A: and therefore, in the justice of the law, he is answerable for them.

So much, sir, for the enormities committed under the orders, influence, encouragement and example of Colonel Henley, when he was not present: as for the rest, it is needless for me to follow the witnesses brought by the colonel through all the parts, wherein they severally and distinctly confirm the former evidence, upon the charges respecting the attempt upon Wilson in the colonel's sight, and of the stabbing Hadley with his own hands. I shall only remark one very striking circumstance, a little previous to the latter fact, which came out upon the second examination of that very honorable and sensible gentleman, Major Swasey. After Buchanan had run away, Colonel Henley (having first ordered some men to load, and put himself at the head of the whole detachment) asked Major Swasey what method he thought they should take to recover Buchanan; the major said, "the best way would be to acquaint the British commanding officer on the hill, and he made no doubt but he would give him up immediately." The major went with a message from Colonel Henley to Major Foster, the British officer then commanding, who ordered the man to be sought for and confined. I state this circumstance to show, not only what was the proper and ready method of avoiding differences and ill blood in fact, but also to show that this method was proper in the judgment of your own temperate officers. The major proceeds to say, that Colonel Henley appeared perfectly satisfied with the answer he brought from Major Foster, but it is well worthy of remark, that the violent act of stabbing Hadley, was committed in the interim of Major Swasey's leaving Colonel Henley and his return.

The whole stress of the evidence upon the defense I have

not remarked upon, goes to one single point, namely, to prove provocation. I have admitted that a sentry was knocked down, as I readily admit every slighter provocation alleged, and shall not give a moment's trouble to the Court, in addition to what I argued and quoted in a former part of the proceedings upon this subject, from undeniable authority of law. I assume it to be undeniable, because I understand, gentlemen, that the criminal and common law of England, as well as a great part of the statute law, are, notwithstanding your present separation, in force and practice in your government, and that your articles of war are almost transcripts from ours. The maxims then, to which I have alluded, will hold equally good in martial and other judicatures.

I have only, sir to revert to the leading proposition, and affirm that the charges are proved in the fullest manner, even by the prisoner's witnesses. It is not for me to suggest an opinion upon the nature of punishment. I scorn the idea of feeling joy from the most rigorous sentence; and the most perfect acquittal would not harm me further, than that such an example might continue the insecurity of the troops. Inflexible and impartial justice, and rigid discipline, are the vital principles upon which a republic rises to maturity, and establishes itself in respect and fame. Should the Court, upon due reflection, find these principles reconcilable with lenity in the present case, and the great tribunal of the world be of a contrary judgment this cause cannot be said to have miscarried.

As to the displeasure which this prosecution may bring upon me, I fear, in the present temper of this part of the country, it is not to be avoided. I stand in this circle, at best an unpopular, with the sanguine enemies of Britain, perhaps an obnoxious character. This situation, though disagreeable, does not make me miserable. I wrap myself in the integrity of my intentions, and can look around me with a smile. Implacable hatred is a scarce weed in every soil, and soon is overcome and lost, under the fairer and more abundant growth of cultivated humanity. To the multitude who only

regard me with the transient anger that political opinions and the occurrences of the time occasion, I retain not a thought of resentment, because I know the disposition and hour will come, when steadiness of principle, that favorite characteristic in America, will recommend me amongst my worst enemies; as Christians I trust they will forgive me; in spite of prejudice, I know they will respect me.

But from the present resentful sentiments of this audience, should I carry my apprehension further, and suppose it possible that misapprehension or misrepresentation of my conduct, should operate upon the supreme rulers of this country to treat me with severity, I hope I should still find myself prepared. Let suspension be added to suspension, and health and fortune, and fame, and life, become successive forfeits in this lingering war—I shall lay at last down my devoted head with this consolatory reflection, that I have done what I ought—that I have performed to the best of my power my duty to my country, to the British troops under my charge, and to myself—and above all, it will be consolation to reflect, that, however misinterpreted or abused, I have acted in all instances, and specifically in this trial, without a spark of private malice towards any individual soever. With this declaration I opened, with the same I conclude, and have only to assure the Court of my acknowledgments for the patience, the attention, and the civility with which they have heard me.

*January 25.*

*The Judge Advocate.* Mr. President, and Gentlemen of the Court: It remains with me to close this cause which has employed so much time, and been the subject of such public expectation. The mode of inquiry established in all trials by courts martial, necessarily renders the process tedious. This has been particularly so, and was an apology wanting, the patience exhibited by the Court through the whole course of it, would atone for the hours spent in the investigation of the subject.

This cause, gentlemen, has been rendered important rather



from the distinguished rank and peculiar circumstances of the very able prosecutor, than from the real merits of it. For, however it may have been insinuated that Colonel Henley was appointed commandant of the garrison at Cambridge, for the purpose of executing the bloody designs of an irritated, vindictive, and sanguinary people; I believe the public, as well as the Court, will consider the prisoner as alone interested in it; and that this trial must forever stand the clearest refutation to any one hardy enough to repeat an assertion as injurious as it is false.

No sooner was the charge handed to General Heath, the guardian of the public military reputation in this department, than Colonel Henley was suspended from his command, and an immediate inquiry ordered into his conduct

Yet, notwithstanding this prompt, this early endeavor to discover facts, and punish if criminality should be proved, a wound has been aimed at the reputation of this country.

It has been said, gentlemen, before a respectable and crowded audience, that a general massacre of the troops of the convention was in contemplation, and Colonel Henley fixed upon as the black instrument of execution. There was not an American present at that time, I dare assert, who did not feel indignation beat in every pulse, while his heart reprobated the idea.

This charge, heightened with all the pomp of words which attic diction and tragic eloquence could furnish; painted in those vivid, animated colors which keen feelings and lively apprehensions would supply; wanted nothing but *truth* to have answered the design proposed. And that this was wanting, you gentlemen, from the evidence now on your table, are, I presume, convinced. The world hereafter may be satisfied. If I though General Burgoyne, when making this assertion, sincerely believed it to be true, though I should wonder at his deception, I should have a better opinion of his fairness; and while we smiled at his panic, we might pity his timidity.

Whatever particular, personal reasons for gaining popularity, or securing the affections of his army, or great political

nothing may have occurred in the prosecution in this business. The question will be as to judge upon what as well as upon what the testimony has been and what the law is and as to what will be required by holding that the sacred principles of truth and justice. It is my duty to exhibit facts as they come from the evidence stripped of the suggestions and inferences which lawyers and others have attempted to create in the mind.

However extensive it may be in General Burgoyne to take a general survey of the case: by well turned periods to catch the attention, and force the admiration of listening crowds; and by a brilliancy of expression, or affected nobility of sentiment attempt to dazzle the more effectively to mislead the Court. The Judge Advocate has a very different part to act; he ought to know no party, but undeviatingly to follow the road marked out by truth alone.

The difficulty of keeping the mind unbiased in this cause will strike the minds of the Court. This is the trial of a gallant and meritorious officer; of a man, whose services in camp and in the field, most of you, gentlemen, have been witnesses to, and whose conduct as a citizen, previous to his commencing the soldier, was ever irreproachable. I must then depend on the candor of the Court, should I err in summing up the evidence, to restore me to the path of disinterestedness. Much is due to the character of such an officer; but more to the safety of thousands, who, disarmed and in our power, are entitled by the laws of nations, of war, of humanity, and of justice, to protection and security, provided no misconduct on their parts, works a forfeiture of these rights. *Fiat justitia ruat coelum.* Let us now look into the evidence; the Court will adjudge the blame to fall where it ought.

It appears that Colonel Henley, on the 19th December, in consequence of orders from General Heath, visited the main guard with Major Swasey, with the design of releasing a number of British soldiers who had got into custody, for different misdemeanors. That he was calm and good-humored, and proceeded to execute his instructions in the most suitable

way, that of inquiring into the respective offenses of the culprits, previous to their dismissal, and cautioning them against conduct which might subject them to another confinement. Reeves, in turn, being asked the cause of his commitment, with some hesitancy informed the colonel. And from his own account it appeared he had grossly affronted an American officer, that even the nerves of the candid, the placid Major Swasey grew irritated, and he was provoked enough to give Reeves a very resentful answer. Colonel Henley's feelings being more keen, he called Reeves a rascal; Reeves retorted the epithet; and the colonel, after repeatedly ordering silence, in order effectually to stop a very harsh altercation which had ensued, dismounted from his horse, seized a gun and fixed bayonet, and pricked Reeves in the breast. It appears, from the concurrent testimony of all the witnesses on the side of Colonel Henley, that his design was rather to silence Reeves than to wound him; rather to convince him he would be obeyed than to injure him. The extreme slightness of the wound, which from the surgeon's account, was little more than a scratch, confirms this to have been the colonel's intention. It would certainly have been better to have remanded him to the guardhouse. And if, gentlemen, you think the witnesses in support of the charge have told you all that really passed, you ought, at least to think that Colonel Henley is a rash, passionate, precipitate officer; a man who considers stabbing his fellow creatures as a very venial offense. But if full credence is given to the evidence of six witnesses, the Court will consider whether an officer, acting in such a character as the colonel then appeared in, so saucily and abusively replied to by a prisoner in Reeves' circumstances, is not pardonable, I do not say justifiable, in adopting such a mode of silencing impudence and repressing contempt.

It has been said that Reeves' behavior was only firm, not insolent. British firmness often so nearly approaches insolence, that Europeans as well as Americans have been very apt to confound them. The Court will recollect the pains

taken, in one or two instances during this trial, to get from the British witnesses their idea of insolence. They all affected to think it impossible a Briton could look insolent. It was, they said, only looking up. But this *or sublime*, this erect countenance they boast of, leads them to looking down upon the rest of the world, though not always with impunity. Britain is feared because she is powerful. What pity it is a nation cannot be just as well as gallant. Less pride had prevented the dismemberment of her empire, had saved the blood of thousands. And real magnanimity had, ere this, arrested the hand of destruction from the heads of men, whose greatest fault, (once the glorious fault of Britons!) is the love of freedom.

As to the charge against Colonel Henley, of intentional murder, there was neither law nor fact to support it. But, says General Burgoyne, Colonel Henley's conduct had a great effect on his guards. He was known to be no friend of the British soldiers: he had himself wounded one, and been violent in his menaces against them all; he thus influenced his soldiers to stab and murder whom they pleased, if they belonged to the British army; and ought therefore to be considered as an accomplice in every outrage which took place.

If this reasoning is conclusive, by the same logic, the general himself is an accessory to all the murders perpetrated by the ferocious bipeds, the savages who accompanied and disgraced his army last summer. Ought it to be said that because these *black* attendants knew that General Burgoyne did not love Americans, that therefore he would be pleased at the butchery of the nerveless old man, defenseless female, and infant prattler? Because he hated rebels, he therefore influenced Indians to massacre that young unfortunate, the inoffending and wretched Miss McCrea!

We come now to the last and principal transaction of the 8th of January—the wounding of Hadley on the parade. It will be necessary to state the circumstances anterior to this unfortunate action. You have the fullest proof, the confes-

sion of the prosecutor, that a sentinel, on the evening of the 7th, was knocked down on his post, that he was beat, disarmed, and his gun carried off. Colonel Gerish, like a true spirited officer, upon hearing of this daring outrage, determined immediately and in person to discover the British soldiers who were concerned in it. He accordingly, with a party of his regiment, surrounded one of the British barracks, and after some opposition, searched several rooms which appeared suspicious. The conduct of a number of very obstreperous fellows, which he found in one of the rooms, strengthened his suspicion, and he thought proper, after being assaulted, menaced, and insulted, to send several of them to the main guard. The transactions of this evening were reported to Colonel Henley next morning with aggravation. The colonel, finding he had got so large a number of British soldiers as twenty-nine, prisoners in the main guard, which was situated so near the barracks of the British army, that some difficulty might arise, adjudged it most prudent to remove all the prisoners up to the town, where a proper inquiry could be made; the culpable punished, and the innocent dismissed. A detachment of one hundred men were ordered to the main guard for this purpose, and the colonel with the town major set out for the hill, to see that the detachment did their duty. On his way down he met Buchanan playing off upon a sentinel the evasive trick which had now become common with the British soldiers, that of escaping from their barracks under counterfeit or borrowed passes. The colonel gave the orders (respecting Buchanan) we have before read, and proceeded on for the main guard; not with the most agreeable feelings, if we suppose the irritation which a variety of offensive reports and provoking considerations must have raised in his mind, during the course of the morning. Soon after he got to the main guard, the detachment marched into the citadel, and formed near the guard house. By this time a very large body of British soldiers had assembled near the guard house, Captain Brooks says, to the number of three hundred. The colonel, apprehensive that some disorders might arise, when

the British prisoners should be sent off with the detachment, and ordered the British soldiers to disperse. Finding he was not likely to be obeyed, he called for a dozen men from the detachment, which produced a movement among them, and they were going off; when just at this time Buchanan was rescued within sight of Colonel Henley. This act of insolent triumph determined Colonel Henley to take the immediate personal command of the detachment, which he instantly marched out of the citadel upon the parade in the rear of the barracks. He had hardly time to halt his men before he was surrounded by the British soldiers, who amounted to near two hundred men, which was double his number. I rate the number on a medium between what they were said to be, by the witnesses for the prosecution, and those in behalf of Colonel Henley. Consider now, gentlemen, what must have been Colonel Henley's sensations; at the head of a party of militia who, from being daily affronted by the British soldiers, were become their jest; that it had at length become absolutely necessary to convince these Britons that there was energy enough in their guards to force obedience and curb licentiousness; that a tumult had arisen the night before, and that an act had just taken place which was a defiance to himself; that he had not room to manœuvre his men without great difficulty, owing to the British soldiers pressing in upon the party; and that these were most of them the very men who had just before been laughing at the party, while paraded in the citadel, and who, in contempt of his orders, were again collected to keep up the laugh at the expense of the detachment. I put it upon this footing, because I think it was apparent they were assembled rather to insult than to assail the party; though they were so near, that it was only stretching out their arms, and it would have been easy to disarm the detachment by a sudden movement; especially after the colonel had detached a quarter of his whole party to bring out the prisoners from the guard house. Under these circumstances, gentlemen, and still more so if he was apprehensive of an attempt to disarm his men, how extremely difficult must it have been for the

the colonel to have checked his resentment, or stopped the hand which had been so repeatedly and insolently defied. The colonel had told them he had lost a prisoner, threatened to fire upon them, and given reiterated orders for them to disperse, before he made the lunge at Hadley. It has been proved that the British soldiers in general were slowly moving off at the time, but not that Hadley was one of them. If you are convinced, gentlemen, that he was going off, you will then consider how far the colonel's impetuosity is reprehensible, and punish him accordingly.

It appears clearly that the British soldiers had no weapons of any kind in their hands, that they made no attempt on the guard nor struck any of them, from which it may be a question whether, had Hadley died of the wound he received from Colonel Henley, the colonel would not have been guilty of murder, because, upon the principles of municipal law, words alone, however impudent or provoking, will not reduce murder to manslaughter, though a very slight blow first given by the person killed might have made the killing manslaughter, or even a less species of homicide.

If the nice distinctions of common law are to be made the rules of conduct in military discipline, and the regulation of a garrison, Colonel Henley must suffer. But I imagine, gentlemen, you will hardly admit this to be true. Because soldiers and citizens are entitled to very different privileges. In an army, the disobedience of an order is sometimes punished with instant death, and such an action justified and applauded, which, was it to take place among citizens, might subject a man to a halter.

Colonel Henley had stood for some time, first in the citadel, and afterwards on the parade at the head of a detachment armed, and heard the provoking epithets of "yankee" and "rebel" very liberally thrown out against his guards, by the Scotch and British loyalists who surrounded him. The word yankee, when used by these proficient in abuse, is intended to convey the idea of clownishness and cowardice. And to call a man yankee rebel, is considered by them as the strong-



est term of invective. Where is the officer, in such circumstances, who could suppress his indignation upon such an occasion? If, gentlemen, you should be satisfied that Hadley, at the time he was wounded, was moving off, you will consider whether Colonel Henley is not very blameworthy for making a violent lunge into a man's body, who was obeying his orders and getting out of his way—should you be convinced that Hadley was not removing, though such peremptory and repeated orders were given him with his comrades to retire to their barracks, your opinion will be different.

Mr. Bibby swears that on the morning of the 8th January, as he passed over the parade where the detachment was drawn up, he heard an officer, whom he took to be the captain of the guard, "damn his men for inattention, and ordering them to run any man through who came near them." This speech appears to have been made soon after the wounding of Hadley, while the passions were in a tumult, and the pulse beating high from what had passed. The order was rash and unjustifiable, and the Court will consider whether the example just set by Colonel Henley, in stabbing Hadley, did not occasion it, and how far he is accountable for encouraging sentiments of such a nature.

The instance mentioned by Colonel Lind, of the sentry's firing on three camp women, cannot by any means affect Colonel Henley, because it does not appear that he ever gave such orders, nor was any report made of it to him. For surely it would be unreasonable to make the commandant of such a garrison as this, where the guards are made up of a young and inexperienced militia, unskilled in military science or duty, accountable for all the mistakes and violence of such soldiers. Had a complaint been made to him of this action, and he had refused taking notice of it, it would undoubtedly have been such an avowal of it, as to have made him responsible for all the consequences of it.

The expressions and violent menaces which Fleming and Wilson swear they heard Colonel Henley throw out at the adjutant general's office on the 16th December, carry with

them, *prima facie*, very strong marks of malice, and a heart boiling with the most vindictive and turbulent passions. But the Court will recollect that the colonel had that morning a report of Mason and Crane being knocked down and disarmed, while one of them was on his post. They were both much beaten. It does not appear what led to the conversation, but Colonel Henley was relating the affair to some officer in the office, when the sergeant came up and met with the salute, which has been laid before the Court. The greeting was rough, to be sure, but might not the meaning only be, that the devil had got into their barracks and possessed the occupiers of them, and that he should turn exorcist some night or other, turn the barracks inside out, and expel him from their territory. But I mean not, gentlemen, to palliate this matter, the words are before you. You are the judges, and will determine how far the sentiments expressed were malicious, and afterwards, as such, acted upon by the colonel.

I will not take up any of the Court's time by remarks on the evidence of the different rescues that took place from the beginning of December to the 8th of January, except of that sworn to by Lieutenant Stearns. This officer, after being insulted in the grossest manner by words and gesture; after having the fellow who gave it rescued in his sight; and after complaining, through tenderness, to the man's own officers; proving the complicated charge against him; to be then trifled with by a promise of a proper punishment being inflicted on the aggressor, and after all to have the fellow set at liberty unpunished; proves the necessity of exercising the right set up by General Heath, of punishing the offenders of the convention troops, who could thus commit enormities with impunity, and shows in how contemptible a light the officers of the guards were held by the British army, and the expediency of convincing them that there was spirit enough to resent injuries, and energy enough to chastise offenders.

I shall now submit the cause, gentlemen, to your decision. Many observations have been omitted, which might have been pertinent, but which have doubtless occurred to the minds of

the Court, particularly with respect to the characters and contradictions of the witnesses. And I doubt not your judgment will vindicate the justice of our country, and be approved by the honest and impartial wherever it shall be known.

#### THE JUDGMENT.

The Court was ordered to be cleared, and, upon mature consideration, decided that the charge against *Colonel Henley* was not supported, and that he be discharged from arrest.

*General Heath* approved this decision, and ordered *Colonel Henley* to resume his command at Cambridge immediately. In the general orders announcing this result, he said:

"The General thinks it to be his duty, on this occasion, to observe, that although the conduct of Lieutenant General Burgoyne (as prosecutor against Colonel Henley), in the course of the foregoing trial, in his several speeches and pleas, may be warranted by some like precedents in British court martials, yet as it is altogether novel in the proceedings of any general court martial in the army of the United States of America, whose rules and articles of war direct, that the judge advocate general shall prosecute, in the name of the United States, and as different practice tends to render courts martial both tedious and expensive, he does protest against this instance being drawn into precedent in future."

## THE TRIAL OF JONATHAN WALKER FOR AID- ING SLAVES TO ESCAPE. FLORIDA, 1844.

### THE NARRATIVE.

Captain Jonathan Walker was a native of Massachusetts, a shipwright and sailor. The summer of 1844 found him in Florida in command of a small vessel whose alleged object was the raising of a wreck in Pensacola Bay for the sake of its copper and cargo. But his connection with a New England anti-slavery society, and his subsequent statements and writings make it certain that his real mission was to assist fugitive slaves in Florida to escape to the Bahama Islands. He anchored near the shore and let it be known to the blacks that if they chose to run away he would take them, and on the 22nd of June, seven slaves took advantage of his offer and came aboard. He at once set sail, but the weather was bad and very little progress was made for several days, and before they could get away from the coast they were overhauled by a couple of small sloops and the whole party conducted to the Keys, from whence they were taken back in a government vessel to Pensacola. Here he was confined in jail for several months, as he was unable to furnish bail. His guilt was easily proved, he was convicted on four different indictments and sentenced to branding, the pillory, fine and imprisonment. He again remained in jail several months, until the money to pay his fine was received from his abolition friends in New England. He got safely home to write a book on his experiences in Florida and to be the subject of a poem by Whittier.

THE TRIAL.<sup>1</sup>

*In the United States Court, Middle District of Florida, November, 1844.*

SAMUEL I. DOUGLASS,<sup>2</sup> *Judge.*<sup>3</sup>

*Nov. 11.*

The prisoner having been previously indicted, was arraigned and pleaded not guilty. Four indictments were returned and they charged, respectively, that he "feloniously and unlawfully did aid and assist to run away," or did steal, take and carry away: (1) A negro man slave named Silas Scott, of the value of six hundred dollars of the goods and chattels of one Robert Caldwell; (2) a negro man slave known by the name of Anthony Catlett, of the value of six hundred dollars of the goods and chattels of Byrd C. Willis; (3) a certain negro slave named Moses Johnson, of the goods and chattels of Robert C. Caldwell, of the value of six hundred dollars, and (4) one negro man slave named Charlie Johnson,

<sup>1</sup> *Bibliography.* "Trial and Imprisonment of Jonathan Walker at Pensacola, Florida, for Aiding Slaves to Escape from Bondage, with an Appendix Containing a Sketch of His Life. 'All Things Whatsoever Ye Would That Men Should do unto You, do Ye Even so unto Them. For this is the Law and the Prophets.' Boston. Published at the Anti-Slavery Office, 25 Cornhill, 1846." On the title page is a hand branded with the letters "S. S." and the book contains pictures of whipping negroes with the paddle, the author in the pillory, and of the author being branded in the hand by the United States Marshal.

<sup>2</sup> Douglass, Samuel I. Emigrated to Florida while it was a Territory, and was appointed in October, 1841, (confirmed February, 1842) as United States Judge for the Middle District of Florida.

<sup>3</sup> Florida was at this time a Territory, not being admitted into the Union until the following year, and a system of territorial courts as distinguished from strictly Federal courts, was in force until such admission. The judicial power of the Territory was vested in a Court of Appeals, superior courts, and such inferior courts as might from time to time be established. The territorial court corresponding to our United States District Court was that of the Superior Court, the jurisdiction being practically the same. In 1844 the Territory was divided into four Districts: Eastern, Western, Middle and Southern.

of the value of six hundred dollars of the goods and chattels of George Willis.

The COURT. Prisoner, have you counsel?

*The Prisoner.* I have not, and my means are too limited to provide counsel, but I am daily expecting advice from friends in regard to that point and I request that my trial may be put off for a few days.

The COURT. If you are not able to provide counsel for yourself, I will provide you one. You may choose any one of the three lawyers here to defend you.

*The Prisoner.* I would like to have the trial put off a few days and if at that time I am not provided with counsel, I shall be glad to avail myself of your Honor's offer.

The COURT. The trial will be adjourned for three days.

November 14.

*The Prisoner* being brought into court, stated that, not having any information from his friends as he had hoped, he would choose Mr. Benjamin D. Wright, a member of the bar, to defend him. The *Jury* was impanelled and the prisoner pleaded *Not Guilty*.

*Walker Anderson*,<sup>4</sup> District Attorney for the United States.

*Mr. Wright* objected to the prisoner being put on trial on four indictments for one act of offense, if it was an act at all.

*Mr. Anderson* replied, but the COURT decided that in order to come at the subject properly, one indictment should be tried at a time.

<sup>4</sup> "Walker Anderson, the district attorney, who, by the bye, was the prosecuting officer, is entitled to my thanks for his kindness and humanity towards me, both in his private and official capacity. He is a mild, considerate and intelligent man; and were he not surrounded by a powerful slavery influence, any society might be proud of such a member. I have for a number of years known him, and can say that he is of the most amiable disposition of any person I ever knew in Pensacola. For a considerable part of my confinement, he furnished me with reading matter and the news of the day; and in his absence, his kind and amiable wife would supply me with literary food."—Walker's Life, p. 66.

## THE EVIDENCE.

**Robert C. Caldwell.** Am second lieutenant in the United States Navy. I accompanied the district marshal to the steamboat Gen. Taylor, at the navy yard, to conduct the prisoner to Pensacola. In conversation with me, prisoner said that Silas came to his boat a little below the city, and got in with some others, but that he did not know him, and did not recollect ever seeing him before. This I believed to be correct, for it agrees with what the boy (Silas) had told me; prisoner said that he had for a long time been of the opinion that he would aid slaves to secure their liberty, if opportunity offered.

**Richard Roberts.** At day-break, on the morning of 8th of July, about five leagues to

the westward of the light ship on Carryfut's reef, I fell in with the prisoner and seven black men in a boat. Was suspicious that the black men were runaway slaves; went alongside boat with my vessel, and told my mate to make fast to the boat, and requested prisoner and the black men to come on board my sloop; said I was bound the same way, and would give them a tow; found out, by some of the black men, that they were runaway slaves; consequently, I took them all to Key West, and delivered them up to the authorities there. Prisoner was sick at the time. He wanted me to let him have his boat and go his way, but I refused.

The *Jury* returned a verdict of *Guilty*. The other three indictments were then submitted to them, on which they returned a verdict of *Guilty*. The sentence was that the *Prisoner* should be branded on the right hand with the letters "S. S.," should stand in the pillory one hour, should be imprisoned fifteen days and should pay a fine of one hundred and fifty dollars.

November 16.

This morning at 10 o'clock the *Prisoner* was placed in the pillory (which stood opposite the court house) by the United States Marshal, Ebenezer Dorr.<sup>5</sup> He was made sport of by

<sup>5</sup> "The Marshal of the district, Ebenezer Dorr, was formerly from the State of Maine, with whom I had been well acquainted for eight or nine years, and we had always been on terms of friendship; but now our mutual feelings were about to be tested; for circumstances having rendered our situations very different, there was no more equality. He was a practical slave-holder and a strong advocate of the system; I an uncompromising opponent of American slavery



the crowd, and George Willis, the owner of one of the negroes, and United States Marshal of the Western District of Florida, threw two eggs at him, which took effect on his head. After the expiration of an hour he was taken back to the court room and placed in the prisoners' dock. The Marshal tied one of Walker's hands to the post, and then (again to quote from the prisoner's narrative) "took from the fire the branding iron and applied it to the ball of my hand and pressed it on firmly for fifteen or twenty seconds. It made a spattering noise like a handful of salt in the fire, as the skin seared and gave way to the hot iron. The pain was severe while the iron was on and for some time afterwards. There appeared but few who wished to witness the scene; but my friend, George Willis, placed himself where he could have a fair view and feasted his eyes on it, apparently with great delight."

*Walker* was then taken back to prison, where he remained until the next June, when a sum of money sufficient to pay his fine and costs and sent by his Abolition friends in New England, reached Pensacola and he was at once released. He sailed from Florida on the 16th of June, and on the 10th of July arrived at Boston and was received with much enthusiasm by the friends and supporters of the anti-slavery cause.<sup>6</sup>

in all its forms; he holding a high office under the territorial government; I, a prisoner for a violation of a territorial law, placed in his custody, and subject almost entirely to his control."—*Walker's Life*, p. 64.

<sup>6</sup> During his imprisonment there were frequent appeals to the Florida authorities by the Anti-Slavery Societies of England and America, and one of these, containing charges of ill-treatment was transmitted by the Governor of Massachusetts to the Governor of Florida. It was referred to the Legislature of the State and was the subject of a report by a Joint Committee of the House and Senate. The Committee treated Walker as a common law-breaker, contended that he was justly punished and recommended that slave stealing should be made a capital crime—which suggestion was afterwards adopted.

## THE TRIAL OF ANTONIO ANCAROLA FOR KIDNAPPING, NEW YORK CITY, 1879.

### THE NARRATIVE.

For many years prior to 1880 there existed in Italy a class of adventurers calling themselves *padroni*. They usually acted in pairs, and worked alternately six months in Italy and America. They obtained children in the Neapolitan districts of the Italian Kingdom, by a contract with the parents to pay a fixed sum for the services of the children at the end of several years, and they agreed to clothe and feed them during that period, and to teach them to sing and play on musical instruments. The parents, who were wretchedly poor and with large families to support, would listen greedily to tales of readily acquired riches in America, and would part with the children under these contracts upon the payment to them of a small sum in advance. The children were then shipped from Naples to Marseilles. From there they were made to walk the entire way through France, singing, playing, and dancing in the towns and villages through which they passed, to some seaport where they were shipped to America. On landing at New York, New Orleans, or some other United States port, they were brought to a rendezvous, usually in some of the city slums, whence they were sent into the streets by the *padroni* by day to play, or to pretend to play on musical instruments, singing and dancing; and at night they were compelled to perform in the lowest dens and concert saloons. On their return to their temporary abode they were compelled to deliver up the whole of their earnings to the *padroni*, of whom they stood in great awe, being threatened, beaten and starved if they did not bring back enough to satisfy them. No portion of this money ever reaches

the parents. It is squandered by the padroni in dissipation, or hoarded for their private enrichment. The result is inevitable. The girls become prostitutes at an early age; the boys learn to steal; both are soon worn out by the life they lead, by the exposure and bad food. Finally they end in the hospitals and Potters' field.

These helpless little children could neither speak nor understand English. They were not only dependent for their subsistence upon these padroni, but were unable to appeal against them even if they dared to do so. Told to say that their padrone was their father, or brother, or other relative, and to give false names both for him and themselves, they were threatened with punishment if they told the truth on any of these points. Hence, it was extremely difficult to derive from them even any correct information of the circumstances under which they were brought to this country.

By vigorous efforts of the English Society for Organizing Charitable Relief and Repressing Mendicity, and the Italian Benevolent Society, the traffic in England had been well broken up.

The Italian Government, in 1873, enacted a law to prevent this inveigling of children from their homes.

In 1874 the Congress of the United States passed an act making it a felony for any one to knowingly and wilfully bring into the United States or the territories thereof any person inveigled or forcibly kidnapped in any other country, with intent to hold such person so inveigled or kidnapped in confinement, or to any involuntary service.

In September, 1879, the New York Society for the Prevention of Cruelty to Children received from the Italian Government information that a padrone, named Ancarola, was about to bring to America a number of children. A close watch was kept for several weeks on all steamers and vessels from Europe, but no trace of the parties could be found, and the search was almost given up as hopeless, when another dispatch was received, through the Italian Consul-General at New York, stating that Ancarola had left Marseilles with

seven boys. In November, upon the arrival of the steamer *Elysia* from Liverpool, among her passengers were found seven boys, but the padrone succeeded in evading the officers and disappeared. The boys, ranging in age from nine to thirteen years, were detained and taken in charge by the society's officers. They all, at first, told the same story; each of them said he had an uncle in Montreal, Canada, whither they were going. This story, after being assured of protection, they admitted was false, and had been taught them by the padrone, Ancarola, with threats of severe punishment, if not adhered to by them. Nothing was heard of Ancarola for several days, and the Italian quarters in the city were placed under espionage by the society's officers, who a week later discovered him in a wine shop near the docks. He was indicted under the Federal statute, tried, found guilty by the jury, and sentenced to five years' imprisonment.

#### THE TRIAL.<sup>1</sup>

*In the Circuit Court of the United States, Southern District,  
New York City, December, 1879.*

HON. CHARLES L. BENEDICT,<sup>2</sup> *Judge.*

*December 10.*

On November 8, Ancarola was brought before Commissioner Lyman, who on November 21, held him in \$5,000 bail to await the action of the Grand Jury. The Grand Jury, having found seven indictments against him for a violation of the Act of Congress to "protect persons of foreign birth

<sup>1</sup> *Bibliography.* "The Italian Padrone Case. The United States of America Against Antonio Giovanni Ancarola. Trial, Conviction and Sentence. Printed by the New York Society for the Prevention of Cruelty to Children, 1880, New York. Styles & Cash, Steam Printers and Stationers, 77 Eighth Avenue."

<sup>2</sup> BENEDICT, Charles L. Member of New York Legislature, 1863. Appointed first United States Judge for the Eastern District of New York, in 1865.

against forcible constraint or involuntary servitude,"<sup>3</sup> the prisoner was arraigned on three of these indictments consolidated into one,<sup>4</sup> and pleaded not guilty.

*Stewart L. Woodford*,<sup>5</sup> United States Attorney; *William P. Fiero*, Assistant United States Attorney; *Elbridge T. Gerry*,<sup>6</sup> and *Lewis L. Delafield* and *M. Taylor Pyne*, for the Government.<sup>7</sup>

<sup>3</sup> See post, p. 876.

<sup>4</sup> One indictment charged, first, that Antonio Giovanni Ancarola unlawfully, feloniously, knowingly, and wilfully, brought into the United States—to-wit, into the City and County of New York, in the State of New York, one Francisco Libonati, a person who had theretofore been inveigled in the kingdom of Italy, with intent to hold said Libonati in confinement and to an involuntary service of begging and of playing on musical instruments. A second count was like the first, substituting "forcibly kidnapped" for "inveigled." A third count was like the first, substituting "inveigled and forcibly kidnapped" for "inveigled." A fourth count charged that defendant unlawfully, feloniously, knowingly, and wilfully held to an involuntary service of begging and of playing on musical instruments, one Francisco Libonati, a person who had theretofore been unlawfully and knowingly sold by certain persons to the jurors as yet unknown into a condition of involuntary servitude for a term of four years and six months, and had been theretofore by the said Ancarola bought for the service and servitude aforesaid, and for the term aforesaid, of the persons aforesaid. A fifth count was like the third count, except that it charged the intent of the defendant to be to hold Libonati to an involuntary service. Two other indictments, with the same charges, were found against Ancarola, except that one of them related to Michele Quirino, and the other to Giosue Guerrieri. The three indictments were consolidated by the Court under Section 1024 of the Revised Statutes, and one trial was had on them as so consolidated.

<sup>5</sup> WOODFORD, Stewart Lyndon (1835-1912). Born New York City. Graduated Columbia 1854. Assistant United States Attorney, New York, 1861. Enlisted in New York Volunteers, 1861, and became in succession Lieutenant-Colonel, Colonel and Brigadier-General. Lieutenant-Governor New York, 1866. Member of Congress, 1873. Minister to Spain, 1897.

<sup>6</sup> GERRY, Elbridge Thomas. Born New York City, 1837. Graduated Columbia, 1857. Admitted to New York Bar, 1860. Vice-President American Society for Prevention of Cruelty to Animals. Commodore New York Yacht Club, 1886-1893. Member State Constitutional Convention, 1867. Founder of the Society for the Prevention of Cruelty to Children, 1874, and its President for many years.

<sup>7</sup> Mr. Woodford and Mr. Fiero represented the United States, Messrs. Gerry, Delafield and Pyne, the New York Society for the

*Colonel Spencer,*<sup>8</sup> for the Prisoner.

December 18.

The jury was impanelled and the examination of the witnesses began today.

*Mr. Fiero* opened the case with a brief statement of the facts he expected to prove.

#### THE EVIDENCE.

*Mr. Jackson.* Am superintendent of the emigrant depot at Castle Garden in this city. The prisoner landed here on November 2nd on steamship *Elysia* from Europe, having with him seven boys; of this number were the three boys here; asked him if those children were with him; he said they were; asked his name and he told me *Anca-rola*; brought him up to the register's desk and he registered their names; asked him where they were going and he said to Montreal, to their relatives there; brought them inside then, and he handed me their passage-ticket to Montreal as evidence that they were going there. The children were not allowed to go with him. He was arrested on November 8th.

*Francisco Libonati.* Was born at Calvello, Italy. My mother is living there; father is dead; was working in a blacksmith's shop for two and a half cents a day, making nails; have two sisters and a brother in Calvello, and a brother and a cousin in New York. Our family is poor; cannot play upon any musical instruments; father had gone to

new York, and had died there. Being at the shop in Calvello, was sent for by mother and went and found with her her brother and the prisoner; mother asked me if I wanted to go to America and I said yes. Uncle said go to America with this man; I said yes. Prisoner said to mother, will you give me your son? She said yes. He said to her I was to play the harp in Chicago. I said that I wanted to play the violin, but he said that I must play the harp; then said that I would play the harp. I went with my uncle to Naples, then to Marseilles and London with another boy. At London met prisoner and other boys, and we all came from London to New York in the steamer. On the way over prisoner said to the boys, If we get arrested, say we are going to Montreal. Have no relatives in Montreal.

*Michele Querino.* Am twelve. My mother is living; father died in New York; was born in Calvello, Italy, and lived there. Am a relative of prisoner; have a sister; our family is poor; did not work at anything, but went to school. Me and mother, uncle

Prevention of Cruelty to Children, and Count Mario Campagnoni Marefoschi appeared in behalf of the Government of Italy.

<sup>8</sup> SPENCER, James Clark. Born Fort Covington, N. Y., 1827. Admitted to Bar, 1850. United States District Attorney, Northern District of New York, 1857. Removed to New York City, 1861. Was a Judge of the Superior Court, a Receiver of the Erie railroad and a Commissioner for the building of the City Aqueduct.

and prisoner being together at Calvello, it was agreed between mother and prisoner that I was to be four years and a half with prisoner in Chicago, and that prisoner was to give mother forty ducats. Prisoner said, You live four and a half years with me, and I will teach you the business and whatever money you make you will give to me. Mother said, If you want to go, go; I don't want to compel you to the contrary. Uncle said the same. Prisoner told me I would have to learn the violin, and that I would be clothed and fed. I said I would go. Uncle took me from Calvello to Marseilles; there we met prisoner, who took me to London and to New York in the steamer. On the way over prisoner told me to tell every one that I was going to see my uncle in Montreal. Have no uncle in Montreal.

*Giosue Guerrieri.* Am eleven years old; father and mother are living in Calvello, Italy, where I was born; have a brother and a sister; mother proposed to prisoner to take me to America. Prisoner had just returned from there. He said that America was a good place, and he talked of the beautiful things of America. He said to father and mother, if you let your son go with me, he will do very well in America, and send you plenty of money bye and bye. He said several times that America was a good place, and that they

would make plenty of money there, and that they were going to make money for them. I was to work, and all the money I was to give to prisoner. Prisoner was to take me to Chicago and to teach me music, and from Chicago he would take me further. This was said to my parents. They told prisoner not to ill-treat me and to feed me properly, and that if they should get a letter from me saying that I was not properly treated they would come and take me away. It was then agreed that prisoner should give father eighty ducats and that I should go with prisoner for four years, and be fed and clothed by him, and taught music. Went to Marseilles, and there prisoner found me. On the way to New York in the steamer, prisoner said to me, Let us pray to God that we can pass through New York all right. After that I will teach you music. He gave me a paper with an address in New York where to go, and told me not to let myself be seen by any officer, for they might arrest me; and, if any one asked me what I was going to do, not to say that I was going with a padrone. He also told me if any one asked me what my business was to say that I was printer; and, if they ask where I was going, to say I was going to Montreal; and if they asked to whom, to say to an uncle; did not have an uncle in Montreal.

*Mr. Fiero.* Gentlemen of the Jury, as counsel for the United States in this case, I beg leave to assert, calling the Court to witness as to the truth of the assertion, and challenging counsel to its refutation, that in this Circuit Court of the United States where questions of the greatest magnitude



affecting the property and lives of individuals and the very existence of the government itself, have been heard and determined, no case of more vital interest has ever occupied the attention of Court and jury.

I am speaking earnestly, gentlemen; yet I trust no more so than the occasion demands, and I beseech you that when after the charge of his Honor in which the law governing this case will be defined and explained, you shall have retired to the privacy of your consultation room, it may be the determination of each and every one of you to adjudicate between the prisoner and the government according to the law and the evidence as you have been sworn to do, having in mind that, while as to the accused you simply say by your verdict Guilty or Not Guilty, at the same time, for the first and it may be the last time, you endorse and give force and effect to, or you repudiate and nullify one of the wisest statutes ever enacted for the protection and enforcement of right, and the redress and prevention of wrong.

As I briefly stated in the opening, gentlemen of the jury, for a long number of years this heartless and inhuman traffic in little children has been carried on between this country and Italy. Wise and good men of this and other countries, beholding the sad spectacle of these little wanderers in America and their pitiable state have heard singing in their ears the Macedonian cry, "Come and help us." In response to that cry, they have earnestly labored to suppress this nefarious business, through moral and educational influences. The wrong of it in every regard has again and again been demonstrated, but all this has been in vain; still the traffic continues; it increased with the welcome multitude pouring through our broad gates from all the nations of the earth, grafting the qualities of older stock upon one stem, mingling the blood of many races in a common stream, and swelling the rich volume of our English speech with varied music from an hundred tongues; the native land of the discoverer of this country sent forth its children to recruit the ranks of the rambling street musicians (arabs), mendicants and thieves

of America. The law was finally invoked and on the 21st day of December, 1873, the Act, a copy of which I now hold in my hand, and which has, notwithstanding the objection of the defense, been introduced in evidence here, was passed by the Senate and Chamber of Deputies at Rome. This law is entitled, "Law on the Prohibition of the Employment of Children in Rambling Trades," and it was clearly the intent of its makers to protect its children and stop this trade. It is the most severe of all the so-called *Padrone* Statutes, and provides generally that any person who shall take abroad or allow or seduce from Italy any child under eighteen years of age to engage as a musician or singer, shall be subject to fine and imprisonment; that any guardian or parent who shall intrust or deliver to another any such child for such purpose shall be punished by fine and imprisonment; that any persons who have allowed children to be taken away from the Kingdom shall immediately notify the Mayor of the community where they reside, who shall make a catalogue of such minors to be transmitted to the royal representative of Italy in the countries where the children are; such representatives shall make a catalogue of such minors, and have the names and residences of the persons in whose charge they are, and all such children shall be returned to the Kingdom of Italy. This law is so sweeping in its provisions that it not only makes the parent or guardian amenable to punishment, but it also makes whoever shall suggest or intimate or whoever shall even assist in suggesting or intimating that a child of the age mentioned should be taken from Italy abroad for the purpose of employment in the different rambling trades herein denounced, amenable to the same punishment by heavy fine and long terms of imprisonment. This law also has another pertinent provision; one which, of course, counsel has carefully attempted to conceal. For it sweeps fore and aft the entire case; it sweeps away this so-called contract, and at once annihilates the proposition he has advanced that the evidence shows a legitimate bargain was made by this *padrone* with the parents and friends of these seven children,

and that you must find the contract binding and send him from this court on account of these instruments. I read article 6 of this Italian Law:

"Whosoever contracts or attempts to contract in any form it may be supposed the one of the purposes mentioned in Sections 1 and 2 either made and or after the promulgation of this law, is null and of no effect, however the same may have been executed or attempted, and whosoever will be liable to marriage contracts in the Kingdom is liable."

What does this section mean when applied to the case at bar? What it means, if it means anything, is that this was an entirely illegal performance on the part of this wicked, cunning pair: that he had no right to the consent of the parents or friends; that he was knowingly violating the Italian law, and it necessarily follows that the Court will charge you, gentlemen, that these children were both inveigled and kidnapped.

Then, gentlemen of the jury, on the 23rd day of June, 1874, Congress passed the Act, under which the prisoner has been indicted, and his trial had, and which reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that whoever shall knowingly and wilfully bring into the United States or territories thereof any person inveigled or forcibly kidnapped in any other country with intent to hold such person so inveigled or kidnapped in confinement or to any involuntary service, and whoever shall knowingly or wilfully sell or cause to be sold into any condition of involuntary servitude, any other person for any term whatever, and every person who shall knowingly and wilfully hold to involuntary services any person so sold and bought, shall be deemed guilty of a felony, and on conviction thereof be imprisoned for a term not exceeding five years, and pay a fine not exceeding five thousand dollars."

The New York Society for the Prevention of Cruelty to Children secured the passage of a similar statute in this state, and in several other states, and it is now making every lawful effort to enforce these laws, and to stop the importation of and cruelty to these poor helpless and homeless little waifs. But this, as I have previously intimated, is the first prosecution under the United States Statute, so that you will readily

observe, gentlemen, that the great overshadowing question you must answer now and here is, has this all been in vain? I repeat, through your action in this case, by your verdict here, you say to the country and the world—remember, you can not evade the issue, for if we have no case now, none can ever be made—you say there is no help. You are powerless or you declare that the law can and shall be enforced, and the padrone's occupation must cease now and forever.

I would not forget to so far notice the allusion counsel has frequently made for the past two days to the strong representation of the Society for the Prevention of Cruelty to Children at this trial, as to say that it was in kind response to my invitation so to do that the honored President, the Consul, with the efficient officers, Superintendent Jenkins, and Mr. Chiardi, have attended in court, and have rendered the Government very material aid in the marshalling of evidence, and the general conduct of the case, for which they merit, and will doubtless receive the thanks of all good people, no matter what may be the result of this trial. Of course, this makes neither one way or the other with you, gentlemen, for you will decide this case on its merits.

As the Court will instruct you, there are but three simple questions to answer in arriving at your verdict, and I am sure that you will find no difficulty with either.

First. Were these children inveigled or forcibly kidnapped in Italy?

Of course, as you will observe, gentlemen, it is not necessary that the Government should show that the prisoner inveigled or kidnapped the children; these acts may have been committed by another, but the prosecution must satisfy you beyond a reasonable, not an unreasonable doubt, that the accused knew they had been so inveigled and kidnapped. Now, gentlemen, you have heard the sad stories of three of these little boys, Francisco Libonati, eleven years of age; Michele Querino, thirteen, and Giosue Guerrieri, eleven, and it is all fresh in your minds, so that it is unnecessary for me to rehearse. As I have already said, the law of Italy, absolutely

prohibiting the assent of parents, guardians, or children, it follows that the children were inveigled or kidnapped, and it is confidently claimed that they were both inveigled and kidnapped. You remember how this padrone operated to obtain control of these children, and that he effected his object by cunningly holding out different inducements, by resorting to artful persuasions, and by the use of money; yes, gentlemen, strange and revolting as it may seem to us, at this day, these unnatural parents actually sold their offspring into involuntary servitude for a few dollars. This has been conclusively shown, and, therefore, two counts in each of these indictments have been thoroughly sustained, and his conviction must follow.

But further, take the evidence of the boy last on the witness stand, the exceedingly bright little Giosue Guerrieri, only eleven years of age, and when he tells you, through the interpreter, in his simple way, that Ancarola himself had several talks with his parents and the boy, at which Ancarola actually urged them to take him from school to go with him; told them America was a good place to make money, and the boy would soon be sending money home; that he made a written contract for the boy, whereby he was to go to America with Ancarola, and stay with him four years and six months, to play the violin in Chicago, and elsewhere, Ancarola to receive the earnings; that his parents refused to let him go, unless money was paid, and Ancarola then gave them one hundred francs; that no one was present except the boy, his father and mother, and Ancarola; that Ancarola cunningly arranged to have the boy delivered to him outside the Kingdom, and paid his passage over; that he cried at leaving home and friends; that, on the ship, Ancarola told him to say, if any one asked him where he was going, that he was not going with Ancarola, the padrone, but that he was going to an uncle in Montreal; that he had no uncle in Montreal; that he told Ancarola's falsehood at Castel Garden, but on the assurance of the Italian Consul that Ancarola could not harm him, told the true story of his inveiglement and kidnapping from Italy.

I repeat, gentlemen, when he related all this and counsel admitted it to be true, having failed to shake him on cross-examination, did you doubt that this first question must be answered in the affirmative, and that Ancarola himself was guilty of the inveiglement and kidnapping? These padroni are cunning; most cunningly they endeavor to evade the law in the inception of their business, and then, when finally caught, accused and arraigned before the Court, can well afford to employ expensive and sharp counsel to execute their well-planned defense, but, in this instance, the well-laid and oft-tried scheme has miscarried; the padrone, Ancarola, cannot now escape—out of the mouths of these children he stands condemned before you.

The second question, gentlemen, did the prisoner, Ancarola, bring these children into the United States? can be answered in the affirmative without leaving your seats.

Then you will come to the third and last question: Did he intend to hold them to any involuntary service? Now, I apprehend, gentlemen, that the Court will charge you as matter of law, that these children were too young to consent to any service, they cannot voluntarily submit themselves to any service; it must be involuntary on their part, and that the premeditated violation of the Italian law by this padrone, and the character of the employment, may be taken into account in this connection as bearing on his intent. I may, however, erroneously anticipate the direction of the Court in this regard; be that as it may, I am convinced that you cannot find, as you must, if your verdict be that of acquittal here, that he simply brought these boys to America on a pleasure excursion, or to visit friends, and they could return home, if they so desired, by the very next steamer, without any hindrance of the prisoner, but on the contrary, you must conclude on the uncontradicted, unimpeached and unimpeachable evidence, that he intended to hold them to an involuntary service; that is to say, that he purposed employing them under his so-called contract, whether they would be so employed or not. For what purpose did he solicit the boys to

come with him to America in violation of this Italian law? Why did he pay all their expenses to America? Why did he pay their friends money? Why did he secure them to himself for four years and six months to play on the violin and harp? Why was he to receive the money they earned? Why did he put the lie into the mouths of these boys on the passage to America, and why did he conceal himself and try to escape arrest in the City of New York? I ask why did he do these and other things I have not time to call to your immediate attention, if he did not intend to hold them to an involuntary service? No, gentlemen, there is no escape from the conclusion that this was the padrone's intent. He has been frustrated, and now asks you to say that there is no evidence but that he intended the boys should act their own pleasure on their arrival in America. Of course, this is ridiculous beyond comparison, and only finds it parallel in the assertions of counsel made for effect upon you, that there is no proof of maltreatment of these children by the padrone. No, the element of treatment one way or another has never been in the case, therefore, you will only be required to say in order to convict, that he intended to do and carry out the simple terms and conditions of his so-called contracts, the statement of which the accused himself admits to be true. It is idle to argue a proposition where we are all at one. Gentlemen, therefore, I abruptly halt here, and with its dismissal submit the case to you.

This prosecution being entirely new, there are no decisions of State or Federal Courts directly in point. I have, however, called the Court's attention to all the authorities I have found bearing either directly or indirectly upon the questions raised in this case, as to inveiglement, kidnapping and involuntary service.

Congratulating you, gentlemen of the jury, upon the speedy termination of the trial, and believing your verdict will be both early and just, I close on behalf of the Government.



*December 19.*

JUDGE BENEDICT. Gentlemen of the Jury: It is difficult, I think, for any thoughtful person to take part in the decision of a criminal case, without a sense of responsibility. The interest of the community in the proper enforcement of the criminal laws is such—the misfortune is so great when an effort to bring an offender to justice miscarries—the misfortune is so great when one innocent is adjudged guilty, that the responsibility attaching to the Judge and to the jury, also, in cases of this description, seldom fails to make itself felt. It cannot fail to be felt in a case like the present, where the prosecution is under a statute now, for the first time, so far as I know, sought to be enforced. The language of the statute is as follows:

“Whoever shall, knowingly and wilfully, bring into the United States, or the territories thereof, any person inveigled or forcibly kidnapped in any other country, with intent to hold such person so inveigled or kidnapped in confinement, or to any involuntary service . . . shall be deemed guilty of a felony, and, on conviction thereof, be imprisoned for a term not exceeding five years, and pay a fine not exceeding five thousand dollars.”

The accused is charged with a violation of this statute, in regard to the three children who have given testimony before you. The charge against the accused is not that he, in Italy, inveigled these children, nor is it that he has held these children in confinement, or to an involuntary service in this country. Such acts have not been made offenses by any statute of the United States. The act which the statute makes an offense, is an act done in this country, namely, the act of bringing into the United States a person inveigled in another country, with intent to hold the person so brought in confinement, or to any involuntary service; and the charge against the accused is, that he did this act, namely, that he brought these children into the United States, knowing that they had been inveigled in Italy, with the intent to hold them in confinement, or to involuntary service, as beggars and musicians. You are called on, therefore, to inquire first whether

the accused did bring these three children, or any of them, into the United States.

If you find it proved that these children landed from a vessel that brought them to this city from a foreign port in custody of the accused; that the accused had selected the mode of conveying them, and directed the movements of the children in coming here, you may find that the children were brought into the United States by the accused.

If you find that the accused brought the children into the United States, your next inquiry will naturally be, whether these children, or any of them, had been inveigled in Italy. There is no evidence that would warrant you in finding that these children had been kidnapped in Italy, and your inquiry at this point, therefore, be confined to the question of inveiglement.

The testimony bearing upon this question is so nearly alike in regard to each of the children, that it will be unnecessary for me to distinguish between the cases, leaving you to consider the evidence in regard to each child, and to notice any differences that may have been disclosed by the testimony. The testimony that has been given in your presence, the truth of which has been admitted to you in behalf of the accused, is to the effect that a bargain was made in Italy between the accused and the parents of the children respectively, by the terms of which the accused was in each case to pay the parent a certain sum of money, in one case less than ten dollars, I think, and, in consideration, thereof, the child was to be delivered to the accused, to be taken by him to this country for the purpose of being here employed for the benefit of the accused—in one case as musician in Chicago, in another to play the violin in Chicago, and in the other to be taught music in Chicago, and from Chicago to be taken further. To this arrangement the consent of the child was in each case obtained, and, in one of the cases, after representations by the accused to the child, in regard to the beautiful things of America.

In pursuance of this arrangement, made in Italy, the child

was taken to Naples—in one case by an uncle—and from Naples sent to Marseilles. There these three children, with four others, were taken in charge by the accused, and thereafter came with him to this city. One of the children is eleven, another thirteen, and another eleven years of age.

In connection with the evidence in respect to the arrangement made in Italy, it will be important for you to consider the law of Italy relating to the employment of children in wandering professions. But it must be remembered that the accused is not on trial for violating the law of Italy, and cannot be found guilty by you because of any violation of the law of Italy that you may believe to have been disclosed by the evidence. He must be found guilty, if at all, for a violation of the laws of the United States, that you have heard read. The law of Italy has been admitted in evidence as bearing upon the question of inveiglement, and solely for the purpose of showing the character of the act to which the consent of these children was obtained in Italy.

The law of Italy provides as follows:

Section 1. Any person who shall entrust, or under whatever pretence, shall commit to natives or strangers, other persons of either sex under the age of eighteen years, though his or her own children or pupils; and any native or stranger who shall receive them, with the intent to employ them in the kingdom, in whatever manner, or under whatever denomination, in the practice of wandering professions, as saltinbanks, witches, charlatans, errant players or singers, rope dancers, guessers, fortune tellers, animal exposers, beggars, and similar wanderers, shall be punished with the imprisonment from one to three months, and fined from fifty-one to two hundred and fifty lire, etc. Section 3. Any one who shall trust or deliver in the kingdom, or take abroad in order to trust or deliver to natives or strangers abroad, persons under eighteen years of age, though his or her own children or pupils, and any native or stranger who shall receive such persons, in order to take, trust or deliver them abroad, for the purpose to employ them, in whatever way and under whatever denomination, in the practice of wandering professions, as shown in Section 1, shall be punished with imprisonment from six months to one year, and fined from one hundred to five hundred lire.

You will observe that the arrangement to which the assent of these children was secured in Italy was unlawful, provided the children were to be employed in a wandering pro-

fession, such as errant-players, or beggars, or similar wanderers. It has been contended here, that these children were not intended to be employed as wanderers in violation of the law of Italy because the evidence is that they were to be employed to play the harp or be musicians in Chicago. But, gentlemen, a child of eleven or thirteen years of age may be a wanderer in the streets of a great city, and if, upon considering the evidence and what has been proved in regard to the character of the arrangement made in Italy, and the age of the children, and their ability to earn money for the accused by labor, you conclude that the arrangement made in Italy in regard to these children, or either of them, contemplated the delivery of these children to the accused to be by him brought to this country for the purpose of being employed as beggars or street musicians in Chicago, and that the child was then and there entitled to consent to such an arrangement, then you will be justified in finding that such child had been inveigled in Italy.

The statute of the United States contains the word "knowingly," and renders it necessary in order to convict the accused, that you should find that he brought the children to this country knowing at the time that they had been inveigled in Italy. The evidence in regard to his knowledge, in regard to any inveiglement of the children, is to be found in the testimony respecting the part he took in making the bargain with the parents and the obtaining of the consent of the child.

The next subject of inquiry is important, for it relates to the intent. In order to a conviction, it must be proved not only that the child had been inveigled in Italy to come to this country in charge of the accused and was brought here by the accused with knowledge of what had transpired in Italy, but it must also be proved that the accused brought the child here with the intent to hold the child when so brought, in confinement or to involuntary service, as a beggar or as a musician. This intent is a necessary ingredient of the offense, and must be proved as laid.

The children were taken from the accused immediately upon landing from the steamer, and it is perhaps best to consider the evidence as insufficient to justify finding an intention to hold the children in confinement; the question rather is, did he intend to hold them to involuntary service as beggars or as musicians. Upon this question the age of the child is important, for, as you know, in regard to some things, a child of such tender years is incapable of consent. The nature of the employment to which the accused intended to put the child, the evidence in regard to the arrangement made in Italy, and the ability of the child to labor or play an instrument, are important circumstances in the connection also, for if you believe from the evidence that the intention of the accused in bringing the child to this country was to employ the child as a beggar or as a street musician for his own profit, and that such employment was one injurious to its morals and inconsistent with its proper care and education, according to its condition, then you will be justified in finding that he intended to hold such child to involuntary service as charged in the indictment, and this notwithstanding the fact that the child had consented to the employment in Italy, and that no evidence of a subsequent dissent while under the control of the accused has been given.

I have now, gentlemen, called your attention to the question of fact which you are called on to determine.

The case is considered by the Government to be important, and such it is; but it is to be determined upon its own facts as they have been proved by evidence, and not upon any general notion in regard to the necessity of punishing padroni, and putting an end to traffic in children.

The accused is entitled to have his case determined upon its own facts, and without any prejudice against him by reason of any supposition on your part as to what others may have done.

It is a criminal case, and the accused is entitled to the benefit of any reasonable doubt in regard to the existence of any of the facts that have been pointed out as material. You

must give the accused the benefit of the doubt and acquit him. If you have no doubt, and are satisfied as to these facts by the evidence that has been given, you must convict him.

### THE VERDICT.

*The Jury*, after a short deliberation, returned a verdict of *Guilty* of the several offenses charged in the indictment, and *Ascarels* was remanded for sentence.

January 12, 1880.

*The Prisoner's Counsel*, having moved for a new trial before Judge BLATCHFORD,\* and a new trial having been refused, the *Prisoner* appeared today for sentence.

Judge BENEDICT. The prisoner at the bar has been duly convicted of the crime of bringing into this country certain persons inveigled in another country, with intent to hold such persons to an involuntary service.

The punishment prescribed by the statute for this crime is imprisonment for a term not exceeding five years, and a fine not exceeding five thousand dollars. The conviction was had upon three indictments, charging three separate offenses, and there was evidence tending to show that the prisoner was liable to conviction upon four other similar indictments on file in this Court. He not only brought into this country the three boys of tender years mentioned in the indictment upon which he was tried, but also four other boys under like unlawful circumstances.

There was no ignorance on the part of the prisoner respecting the character of the transactions in which he was engaged. The law has been upon the statute-book for several years, and the evidence given at the trial showed actual

\* BLATCHFORD, Samuel (1820-1893). Born New York City. Graduated Columbia 1837. Private Secretary to Governor Seward 1839-1841. Admitted to Bar 1842. Practiced law as partner of Wm. H. Seward and Christopher Morgan (Auburn, N. Y.) 1845. Removed to New York City 1854; U. S. District Judge 1867; U. S. Circuit Judge 1878-1882. Associate Justice Supreme Court of the United States 1882-1893. Reporter of Blatchford's Circuit Court Reports, and Trustee Columbia College.

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knowledge by the prisoner that he was violating the law. My attention has been called, in behalf of the prisoner, to the fact that this is the first conviction under the law. It is the first conviction, but I do not know that it is the first violation of the law. My desire on this occasion is to inflict a punishment that will tend to prevent violations of this law in the future, and, it may be, make this, the first conviction, also the last. I am anxious to avoid undue severity, and at the same time so to administer the law in this case as to prevent the commission of similar crimes by others.

The sentence of the Court upon the indictment numbered one, for the offenses therein charged, is that the prisoner at the bar be imprisoned for the term of five years, and pay a fine of one dollar, the sentence to be executed in the Albany Penitentiary. The sentence upon the second and third indictments will be suspended.





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